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# In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. **77-603**

JAMES MARTORANO,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

**Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

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H. Rep. 1040, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News (1968) 20n
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Comment, "The Hearsay Exception for Co-Conspirators' Declarations," 25 U. Chi. L. Rev. 530 (1958) 34n

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New York State, Temporary Commission of Investigation, An Investigation of the Loan Shark Racket (1965) 21n

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Pennisi, Carolyn M., "Loan Shark Problem in Atlanta, Georgia," 19 Law & Cont. Problems 94 (1954) 23n



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UNITED STATES OF AMERICA,
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**Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

James Martorano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 30, 1977, May 23, 1977, and August 24, 1977.

## Opinions Below.

The Court of Appeals for the First Circuit issued three separate opinions in this case. The initial opinion of March 30, 1977, not yet reported, is reproduced in the Appendix at pp. 1a-16a in the form in which it was originally released to the parties. The opinion of May 23, 1977, denying in part Martorano's petition for rehearing, amending the initial opinion in several respects[1] and requesting further briefing on one issue, is reproduced in the Appendix at pp. 17a-23a. (This opinion is not to be published in the official reports.) The opinion of August 24, 1977, not yet reported, denying the balance of the petition for rehearing, is reproduced in the Appendix at pp. 24a-29a.

## Jurisdiction.

The original judgment of the Court of Appeals was entered on March 30, 1977 (App. 1a). A timely petition for rehearing was denied in part on May 23, 1977, and after further briefing, denied in full on August 24, 1977. The time for filing a petition for writ of certiorari was extended to and including October 23, 1977 (App. 30a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

[1] When the initial opinion is published it will contain the amendments made by the court of appeals in response to Martorano's petition for hearing.



## Introduction.

This case presents three issues of fundamental importance to the administration of criminal justice in the federal courts which have never been previously presented to this Court. Two of those issues deal with the constitutional limits on the government's power to obtain convictions for extortionate extensions of credit (loansharking): first, can a conviction for loansharking rest solely on the statutory "prima facie factors" of proof of a usurious loan and borrower's subjective belief that the defendant has a "rèputation" for violent collection tactics in the absence of evidence that the defendant ever threatened or intended to threaten violence, that he, in fact, ever employed violent means, or that he was in any way connected with "organized crime";[1] second, can such a conviction be sustained without allowing the defense to test the reasonableness of the borrower's beliefs about the defendant's reputation through cross-examination as to the basis and source of those beliefs. Because prosecutions for loansharking are playing an increasingly important role in the federal campaign against organized crime, it is essential that this Court clarify these questions at the earliest possible juncture. Petitioner has found no other court of appeals' decision which has faced these constitutional issues; consequently, the lower court's decision, if allowed to stand unclarified by this Court, may spawn an entire generation of loansharking convictions whose constitutionality is in serious question.

[1] The petition for certiorari filed in *DeVincent* v. *United States*, No. , raised a question about the constitutionality of instructing the jury that it could use the prima facie factors on a record in which "considerable attention was directed toward the appellants' threat of violence," 546 F.2d at 456; it did not challenge the sufficiency of a verdict upheld on the basis of those factors in the total absence of any evidence of threat of violence.

The third important issue presented by this petition is whether the new Federal Rules of Evidence governing the co-conspirator exception to the hearsay rule overrule or in any way undercut the vitality of the teaching of *Glasser* v. *United States*, 315 U.S. 60 (1942) — namely, that the hearsay declaration of an alleged co-conspirator cannot be used to prove the existence of the conspiracy which is itself the necessary predicate to the admissibility of that hearsay declaration as against the defendant. The co-conspirator exception to the hearsay rule is a central feature in virtually every federal conspiracy trial. The interpretation of the new Federal Rules rendered by the court below casts serious doubt on the continued vitality of the *Glasser* rule and thus casts into confusion the standard by which the admissibility of co-conspirator hearsay should be measured. Guidance from this Court is necessary to settle this issue and to clarify whether its own previous holding in *Glasser* v. *United States* has been abrogated.

**Questions Presented.**

I. Do Fifth Amendment principles of due process permit a conviction for extortionate extension of credit to rest solely on proof that a usurious loan was made and that the borrower subjectively believed that the defendant had a reputation for violent collection tactics?

A. In light of the fact that the vast majority of reported usury cases do not involve violence, do "reason and experience" demonstrate with substantial assurance that the presumed fact — the defendant's contemplation of violent collection tactics — flows more likely than not from the proved facts of a usurious loan and the borrower's belief



in the defendant's reputation for violence, either alone or in combination?

B. Can the proved facts of a usurious loan and the borrower's belief in the defendant's reputation for violence support an inference of proof beyond a reasonable doubt that the lender harbored, at the time of making the loan, the intent to use or to threaten violent collection tactics, as is required in order to sustain a conviction for making an extortionate loan?

II. In a prosecution for extortionate extension of credit in which the conviction is sustained in part on the basis of evidence of the borrower's belief in the defendant's reputation for violence, does the Sixth Amendment right to confrontation permit a trial court to cut off all cross-examination as to the basis and reasonableness of that belief?

III. Do the new Federal Rules of Evidence undercut the teaching of *Glasser* v. *United States*, 315 U.S. 60 (1942), prohibiting the use of a hearsay declaration to prove the existence of a conspiracy which in turn is used to justify the admission of that hearsay into evidence under the co-conspirator exception to the hearsay rule?

A. In enacting Rules 104(a) and 801(d)(2)(E) of the Federal Rules of Evidence, did Congress intend to overrule the requirement announced in *Glasser* that the existence of a conspiracy must be proved by "independent evidence" before an alleged co-conspirator's declarations could be introduceable against the defendant?

B. Absent the *Glasser* requirement of "independent evidence," can the co-conspirator exception to the hearsay rule withstand scrutiny in light of the Sixth Amendment right to confrontation?

C. Does the conflict between the First Circuit on the one hand and the Second, Third, Fourth, Fifth, Eighth and Ninth Circuits on the other hand, over the continuing

vitality of the *Glasser* requirement of "independent evidence," require authoritative resolution by this Court?

**Constitutional Provisions and Statutes Involved.**

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .."

Section 891 of Chapter 42 (Extortionate Credit Transactions) of Title 18 of the United States Code provides definitions and rules of construction concerning extortionate credit transactions. Its text is set out in full in the Appendix at pp. 31a-32a.

Section 892 of Chapter 42 (Extortionate Credit Transactions) of Title 18 of the United States Code provides in subsection (a) the penalty for making extortionate extensions of credit, and in subsection (b) the factors which comprise "prima facie evidence that the extension of credit was extortionate." Its text is set out in full in the Appendix at pp. 32a-34a.

Rule 104(a) of the Federal Rules of Evidence provides in pertinent part:



> "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides in pertinent part:

> "A statement is not hearsay if — . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

**Statement of the Case.**

The petitioner and three others were charged, in a four-count indictment, with allegedly conspiring to make and making an extortionate extension of credit in violation of 18 U.S.C. § 892, and conspiracy to use and using extortionate means to collect an extension of credit in violation of 18 U.S.C. § 894. Two of those named in the indictment, James Matera and Frank Pagano, were severed pre-trial, and the other two, petitioner and Brian Halloran, stood trial together. Halloran was acquitted and petitioner convicted on all counts.

The charges all stemmed from a single loan which petitioner allegedly made to one Peter J. Pallotta. At trial, Pallotta was the government's key witness: he testified to the circumstances surrounding both his receipt of the loan and his making of several payments on it. According to Pallotta, petitioner, a restaurant owner and long-time friend of Pallotta's brother, agreed, at the brother's request, to lend Pallotta $2,000 in cash which Pallotta urgently needed

to pay certain pressing debts which had arisen in connection with the running of his nightclub. At the time that the brother requested the loan petitioner indicated that there would be a charge of 5 per cent (or $100) per week for the use of the money. The next day, when Pallotta arrived at petitioner's restaurant to pick up the cash, alleged co-conspirator Matera was also present. After ascertaining a convenient time for Pallotta, petitioner asked Matera to go to Pallotta's nightclub at that time each week to collect the weekly payments. No collateral was required and no papers were signed. The parties stipulated that under the relevant state law "any loan at a rate of interest in excess of 20 per cent per year, may be declared void" upon a proper application by the borrower. Pallotta's testimony — which was the sole government evidence concerning the circumstances surrounding the making of the loan — contained absolutely no indication that petitioner, or Matera, spoke any threatening words, or engaged in any threatening looks or gestures, or in any way communicated a danger that payments on the loan would be enforced by threat or use of violence. Nor had Pallotta personally engaged in any prior borrowing transactions with petitioner or with Matera.

Pallotta testified, however, that when he accepted the loan, he believed in his own mind that, if he were delinquent in making payments or failed to repay the loan, he would be physically harmed. While Pallotta did not articulate any specific basis for this belief, he was permitted to testify that at the time of the loan he "knew" petitioner had a reputation as "a loan shark" who used physical force to ensure repayment.[3] Despite defense objection, this testimony was introduced without any evidentiary foundation demonstrating the reasonableness of Pallotta's beliefs about the petitioner's reputation. On cross-examination the defense attempted to test the reasonableness of those beliefs

[3] Pallotta was also permitted to testify that he "knew" Matera, Pagano and Halloran to have reputations as "loan sharks."



by questioning Pallotta about the basis and source of his "knowledge" about petitioner's reputation; but the trial court sustained the government's immediate objection and cut off that entire line of inquiry. The reputation testimony was "admitted subject to the limitation that it could be considered only as to *Pallotta's* state of mind" (App. 4a) (emphasis added). No evidence was introduced linking petitioner to "organized crime" either by fact or by reputation.

After making several payments on the loan, including one allegedly collected by Halloran at gun point, Pallotta's nightclub closed down and he lost his sole source of income. At that time, apart from his debt to petitioner, Pallotta owed money to "a great many" other persons in the Boston area. Lacking the resources to repay his numerous debts, Pallotta became apprehensive that he would meet with physical harm at the hands of these "loan sharks" and, consequently, he went into hiding. He soon contacted the FBI and was placed in protective custody, where he remained through the time period covered by the conspiracy charges in the indictment.

While in protective custody, Pallotta made a series of telephone calls which were monitored and recorded and ultimately used against petitioner at trial. Eight of those taped conversations were between Pallotta and Pagano and provided significant corroboration of Pallotta's in-court testimony. Admitted over defense objection, the Pallotta-Pagano taped conversations verified the existence of the loan, revealed that Pagano and Matera had supplied half the money involved in the loan, and confirmed that Pallotta could be in physical danger if he went to see petitioner at his restaurant.

A. The Treatment by the Court of Appeals of Petitioner's Challenge to the Sufficiency of the Evidence to Prove the Essential Element of His State of Mind.

In its initial decision the court of appeals held that there was sufficient evidence to convict petitioner because, under the statutory presumption of 18 U.S.C. § 892(b), proof of the key element (petitioner's "understanding" that violence would be used) was established by the "prima facie" factors of a usurious loan and the borrower's belief in the lender's reputation for violence (App. 5a; see also p. 7a-8a, n. 3.[4] It stated without elaboration that, under its earlier decision in *United States* v. *DeVincent*, 546 F.2d 452, 455 (1st Cir. 1976):

> "there is no constitutional bar to permitting a jury to infer from the coexistence of these four [prima facie] facts that the lender understands that violence will follow nonrepayment of the loan." (App. 5a.)

In denying rehearing, the court of appeals clarified its view of the constitutionality of the § 892(b) presumption. "Nothing" in that view, the court explained, "turned on the presence or absence of threats of violence" (App. 18a). On the contrary, it stated that

> "Indeed, § 892(b) comes into play as a significant factor only when the jury does *not* have creditable direct evidence of a threat of violence." (App. 18a.) (Emphasis added.)

[4] In thus relying on the borrower's belief in the lender's alleged reputation for violence as part of the proof of the lender's actual intent to use violence, the court of appeals contradicted the trial court's ruling that the reputation testimony was admitted subject to the limitation that it could be considered only as to the *borrower's* state of mind.



B. The Treatment by the Court of Appeals of Petitioner's Challenge to the Denial of His Right to Cross-Examine Pallotta as to the Reasonableness of His Beliefs About Petitioner's Reputation.

In the original version of its opinion the court of appeals recognized the "particularly compelling need" to permit a defendant to explore the basis of the borrower's belief about the defendant's reputation but held nonetheless that the district court was "entirely warranted in precluding inquiry into the specific individual sources of Pallotta's belief" (App. 11a). While denying rehearing on this issue, the court of appeals emphasized the importance of the right claimed by petitioner and the grave potential prejudice which may result from its deprivation. It concluded:

> "While we find no reversible error here, we recognize the danger of allowing prejudicial reputation testimony without any realistic testing for its credibility. To the extent that a strong foundation has not been developed prior to admission, a court should not be too strict in restricting cross-examination." (App. 21a-22a.)

C. The Treatment by the Court of Appeals of Petitioner's Challenge to the Admissibility of Pagano's Hearsay Declarations.

From the outset, the court of appeals agreed with petitioner's view that, without more, the "independent evidence" in the case — the evidence outside of the Pagano statements — failed to establish satisfactorily the existence of a conspiracy between Pagano and petitioner. In fact, it found initially that only by *adding* to the body of "independent evidence" "a fact which was revealed by the [very] statements seeking admission" (the "fact" that Pagano and

Matera had supplied half the money which petitioner gave Pallotta) did "a solid basis" emerge for finding that conspiracy (App. 14a). The court held, however, that reliance upon that particular non-independent, hearsay "fact" to establish the conspiracy was proper under the new Federal Rules of Evidence. While acknowledging that *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), precluded such reliance, the court of appeals stated:

> "[T]he new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists." (App. 15a.)

Doubtless recognizing the serious ramifications of its own decision, the court of appeals granted limited rehearing to review its decision that Rule 104 of the Federal Rules of Evidence "effects a partial overruling of *Glasser*" (App. 23a).[5] In its opinion on rehearing, the court of appeals once again announced its view that the "viability" and survival of the *Glasser* requirement of independent evidence is "in doubt" (App. 24a, 27a); indeed, it devoted two pages of its opinion to "briefly outlin[ing]" its reasons for this view (App. 27a-28a). The court also reaffirmed its finding that only by *adding* certain information contained *in the Pagano statements* to the "independent evidence" was a "solid basis" created "for the conclusion that a conspiracy existed" (App. 25a). Further, while the court claimed to have found a way to uphold the admission of Pagano's statements without having to "face this troublesome

[5] Although the court of appeals also asked the parties to brief for rehearing the question whether the error in admitting Pagano's statements, if one occurred, was "prejudicial" (App. 23a), the court did not reach this question in its final decision.



[*Glasser*] issue" (App. 24a), analysis of its reasoning reveals that the court did, in fact, once again rely on its rejection of *Glasser* to reach its ultimate decision of admissibility. The device used by the court of appeals in its effort to avoid "fac[ing] this troublesome [*Glasser*] issue" was to label certain aspects of Pagano's statements as "verbal acts" which demonstrated Pagano's own complicity. Because "verbal acts" are "not hearsay" (App. 25a), the court of appeals reasoned, those portions of Pagano's statements which are "verbal acts" can be relied upon without running afoul of the *Glasser* requirements of "independent evidence." The fallacy in this reasoning is that while Pagano's "verbal acts" are "not hearsay" *as to Pagano himself*, the label "verbal acts" does not render them any the less hearsay *as to petitioner*. Therefore, by using these "verbal acts" as part of the evidence to support the predicated finding of conspiracy, the court of appeals once again relied squarely on the contents of "the very statements seeking admission" to justify placing Pagano's statements before the jury on the question of *petitioner's* guilt.

## Reasons for Granting the Writ.

### I. The Decisions Below Resolve the Important Issue of the Constitutionality of the Statutory Presumption Embodied in 18 U.S.C. § 892(b) in a Way which Conflicts with Settled Principles of Due Process.

#### A. *Introduction.*

An "extortionate extension of credit" is defined by 18 U.S.C. § 891(6) as one

> "with respect to which it is *the understanding of the creditor and the debtor* at the time it is made that

delay in making repayment or failure to make repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." (Emphasis added.)

As the legislative history of the Consumer Credit Protection Act makes clear, the gravamen of the offense under 18 U.S.C. § 892 is the existence of that extortionate "understanding."

> "It should be emphasized . . . that the offense under *section 892*, and *the only offense*, is the making of an extension of credit *with the understanding that criminal means may be used to enforce repayment*. . . ." Conf. Rep. No. 1397, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News (May 20, 1968) p. 2027 (emphasis added).

Thus, unless it is proved that the *lender* as well as the borrower possessed an extortionate "understanding" when the loan was transacted, a conviction for loansharking cannot be sustained.

Under the holding of the court below, this essential "understanding" on the part of the lender may be established exclusively by operation of the statutory presumption embodied in 18 U.S.C. § 892(b). That section provides that "the coexistence" (App. 5a) of "all of the following factors" constitutes "prima facie evidence that the extension of credit was extortionate":[6] (1) the unenforceability of

[6] This Court has explicitly recognized that, in criminal cases, "statutory provisions that certain facts are prima facie evidence of other facts or of guilt" are merely a species of "presumptions against an accused" and hence must be evaluated and treated under the same standards applied to those presumptions which are labeled as such. Supreme Court *Standard* 303; "Presumptions in Criminal Cases," 1 Weinstein, *Evidence*, 303-1, 303-8. Thus, for example, despite different statutory language, the operation of 26 U.S.C. § 7404(a) (unlawful to deal in opium except from original stamped package; absence of stamps "*prima facie evidence*" of violation by person in possession) and 26 U.S.C. § 4724(c) (unlawful to possess narcotics without registration and payment of tax; possession "*presumptive*" evidence of violation) is procedurally the same.



repayment of the loan through civil judicial processes; (2) an interest rate in excess of 45 per cent per year; (3) the borrower's reasonable belief either that the lender used extortion to collect other debts or that the lender has "a reputation" for doing so; and (4) the total amount loaned in excess of $100. Undoubtedly, proof of three of these four factors (numbers (1), (2) and (4)) establishes the existence of a usurious loan, and the fourth factor (number (3)) strongly supports an inference of the *borrower's* understanding that his delinquency in repayment may lead to physical harm. But the statute does not punish the lesser crime of usury: indeed, Congress could not have been clearer in explicitly emphasizing that the proscription against loansharking "is *not*, and is *not* intended to be, a Federal usury law, nor does it have anything to do with interest rates as such." Conf. Rep. No. 1397, 90th Cong., 2nd Sess., U.S. Code Cong. & Admin. News 2029; see 2027 (1968) (hereafter "Conf. Rep." No. 1397) (emphasis added).[7] Nor does the statute punish an "understanding" on the part of the *borrower*: it is the *lender's* intent to use extortion — the *lender's* "understanding" that enforcement will be by extor-

[7] As Congressman Poff, sponsor of the loan shark provisions of the Consumer Credit Protection Act, explained for the record:

> "It is important to know what the loanshark amendment . . . does not do. . . . *It does not constitute a Federal criminal usury statute.* On this last point, there seems to be some public confusion. Undoubtedly, this arises from mention in the amendment of a 45 percent interest rate." 114 Cong. Rec. 14390 (1968) (emphasis added).

tionate means — which is the "ultimate fact upon which guilt is predicated" (see *Tot* v. *United States*, 319 U.S. 463 (1943)).[8] The critical question, then, is whether a jury may, consistent with principles of due process, presume from the proved facts of *usury* and the *borrower's beliefs* about the lender, the ultimate fact of *the lender's extortionate understanding* — and whether it may do so "beyond a reasonable doubt." The court below resolved that question in a way which squarely conflicts with the principles announced by prior decisions of this Court.

B. *By Allowing a Conviction for Extortionate Extension of Credit to Rest Solely on Proof of an Usurious Loan and a Borrower's Subjective Beliefs about the Lender's Reputation, the Statutory Presumption of § 892(b) Transgresses the Due Process Limits Staked Out in Tot v. United States, 319 U.S. 463 (1943), and its Progeny.*

The constitutional standard by which to measure the validity of a statutory presumption in a criminal case was announced by this Court in *Tot* v. *United States*, 319 U.S. 463 (1943), and refined in *United States* v. *Gainey*, 380 U.S. 63 (1965); *United States* v. *Romano*, 382 U.S. 136 (1965); *Leary* v. *United States*, 395 U.S. 6 (1969); and *Turner* v. *United States*, 396 U.S. 398 (1970). Precisely so as to prevent "conviction upon insufficient proof" (*Turner*, 396 U.S. at 404; see *Leary*, 395 U.S. at 37), these cases require the invalidation of a statutorily-authorized inference unless "reason and experience support the inference" (*Tot*, 319 U.S. at 467) to such an extent that "it can at least be said with substantial assurance that the presumed fact is

[8] The legislative history suggests that the real "ultimate fact" which Congress had in mind was lending money at an exorbitant rate of interest *while being a member of "organized crime."* See Conf. Rep. No. 1397, 2025, 2029. However, that is not the crime which Congress made punishable. See *Tot*, 319 U.S. at 472, and *Leary*, 395 U.S. at 34.



more likely than not to flow from the proved fact on which it is made to depend." *Leary*, 395 U.S. at 36. Neither "reason" nor "experience" support the statutory presumption at issue here.

On its face, the § 892(b) presumption suffers from an insurmountable logical — and constitutional — defect. Although the inference of the ultimate fact of the lender's extortionate "understanding" is made to depend on the "coexistence" of all of the four factors,[9] three of those factors — which establish the existence of an illegally high-interest loan of more than $100 — provide absolutely no basis to decide whether the loan in question is an "extortionate extension of credit" in violation of the statute, or is merely a *usurious* loan and hence *not* a crime under the statute. It stands to reason, then, that to decide the question of guilt under the statute, it is necessary to look to the fourth, presumably distinguishing, factor — the *borrower's belief* in the lender's *reputation*. It is logically impermissible, however, to leap from the *borrower's beliefs* to the *lender's* "understanding." The *borrower's thoughts* can reveal nothing about the *lender's* state of mind. Nor can the lender "be held criminally responsible for [the] conclusions" in the borrower's mind. See *Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963), cert. den. sub nom. *Palermo* v. *United States*, 377 U.S. 953 (1964). Indeed, to hold a lender criminally responsible because a borrower believes

[9] It should be noted that there is some confusion in the legislative history as to whether Congress intended the inference of the lender's "understanding" to rest on all four factors or solely on the three factors establishing a usurious loan. See Conf. Rep. No. 1397, *supra*, at 2021, 2027. However, in light of the ruling of the court below that the statutory presumption depends on "the coexistence of [the] four factors" (App. 5a; see p. 7a-8a, n. 3) — and in light of the express language of § 892(b) that the presence of "all of the [four] factors" constitutes "prima facie evidence" — it is assumed for purposes of this petition that, indeed, all four factors must be established for a conviction to be upheld on the basis of the § 892(b) statutory presumption.

that the lender has a *reputation* for violence would violate the cardinal principle recognized by this Court in *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948), that a defendant's *reputation* may not be used to prove the crime for which he is charged. This is especially so in a case where, as here, the trial court expressly ruled that "this reputation testimony was all admitted subject to the limitation that it could be considered only as to Pallotta's state of mind" (App. 4a).

Nor is the statutory presumption of § 892(b) saved by "experience." *Leary* provides a model for analyzing whether "experience" does, in fact, provide a constitutionally adequate basis for validating a congressionally authorized presumption. While acknowledging that "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it," this Court in *Leary* went beyond the legislative record and tested Congressional conclusions by critical review of the available empirical data and by hard analysis of the *logical* limits of what may be inferred from a given set of proved facts. See 395 U.S. at 38-52. Noting that the critical question was "the *beliefs* of marihuana users generally about the source of the drug they consume" (*Leary*, 395 U.S. at 38, emphasis added), the Court reasoned that even though the empirical data unquestionably demonstrated that "most domestically consumed marihuana comes from abroad" (395 U.S. at 44; emphasis added),[10] "[o]nce it is established that a significant percentage of domestically consumed marihuana may *not* have

[10] Reports in the Congressional record in fact show that estimates of the proportion of imported to domestically-grown marihuana range as high as 90 per cent. See Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 17-18, 2384 (1955). See also Hearings on Traffic in, and Control of Barbiturates and Amphetamines of the House Committee on Ways and Means, 84th Cong. 1071 (1955-1956).



been imported at all, then it can no longer be postulated, *without proof*, that possessors will be even roughly aware of the proportion actually imported." 395 U.S. at 46 (emphasis added). Since "none of the best kind" of such proof — namely, "testimony of marihuana users about their own beliefs as to origin" (395 U.S. at 47) — was available, the court studied a vast array of empirical materials, both within and without the legislative record "in an effort to sustain the presumption" (395 U.S. at 38). Forced to conclude that the available materials left the Court "at large to estimate even roughly the proportion of marihuana possessors who have learned in one way or another the origin of their marihuana" (395 U.S. at 52) — and noting that "a not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country" (*id.* at 52-53) — the Court found it "impossible" to determine with substantial assurance that at least a majority of marihuana possessors have learned of the foreign origin of their marihuana (*id.*); accordingly, the Court struck down the "knowledge" presumption. Significantly, the "not inconsiderable proportion of domestically consumed marihuana [which] appears to have been grown in this country" was estimated, in the materials before the Court, as to be as low as in the vicinity of 10 per cent. See p. 18, n. 10, *supra*.[11]

[11] The Court applied a similar reasoning process in *Tot*, refusing to validate an inference of interstate acquisition of firearms and a finding of possession without documentation showing intrastate acquisition — despite the fact that "in *most* states, laws forbid the acquisition of firearms without a record of the transactions. . . ." 319 U.S. at 468. Noting that "a number of states [had] no such laws," and that other alternative explanations were available (*e.g.*, unlawful intrastate acquisition and interstate shipment prior to the date of state regulation), the Court concluded that the inference of interstate acquisition from the bare fact of no intrastate record is unreasonable and hence unconstitutional. *Id.*

The analog to the case at bar is striking. The critical question here concerns the "understanding" of lenders of exorbitant interest loans, just as the critical question in *Leary* concerned "the beliefs of marihuana users" — and here too the Congressional record contains "none of the best" evidence concerning that critical question. Nor, despite extensive hearings and submission of reports on matters relating to loan sharking,[12] does the Congressional record contain any information which would premit an empirical estimate of the *proportion* of usurious loans which entail an "understanding" on the part of the lender that violent collection tactics will follow. Nor does the addition of the factor of the borrower's beliefs about the lender's reputation alleviate this total information vacuum.[13] Doubtless many usurious loans with fearful borrowers *do* involve such a lender's understanding, just as many instances of marihuana possession entail the possessor's "knowledge" of illegal importation. But, as *Leary* holds, that is not enough.

[12] Hearings on HR 11601 before the Consumer Affairs Subcommittee of the House Banking and Currency Committee, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 24461, 31469-31473; 114 Cong. Rec. 1041, 1428-1431, 1607-1610, 13565, 14105, 14375-14396, 14486-14490; H. Rep. 1040, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News 1962-2021 (1968); Hearings on Impact of Crime on Small Business before Senate Select Committee on Small Business, 90th Cong., 2d Sess., 1-131 (hereafter "Senate Hearings"); Conf. Rep. No. 1397, *supra*, at 2025-2029.

[13] Although perusal of the legislative history does indicate Congress' belief in a substantial connection between loansharking and "organized crime," that believed connection cannot substitute for evidence as to the actual proportion of unsurious loans in which borrowers are apprehensive which *actually* involve a lender's intent to threaten or to use violence — the "ultimate fact" actually made punishable by the statute. Moreover, even as to the believed connection between loansharking and organized crime, the legislative record contains many conclusory assertions but no hard empirical, reliable data. Indeed, Henry Ruth, former Deputy Director of the President's Task Force Against Crime (and professor law at the University of Pennsylvania), testified before the Senate that it is impossible "to allocate exact proportions to the amount of loan shark business that is part of, or affiliated with La Cosa Nostra." Senate Hearings, *supra*, at 20-21.



Moreover, one thing that the Congressional record does make clear is that *not all* usurious loans involve the intent made punishable by the statute; indeed, reports and testimony contained in the legislative history explicitly indicate that many loan shark activities are unconnected with "organized crime" and involve no threats or use of violence.[14] The original impetus for enacting the Consumer Credit Protection Act was, in fact, to protect small borrowers against exorbitant interest rates in contexts in which *no* extortionate collection tactics were at issue. See Hearings on HR 11601 before the Consumer Affairs Subcommittee of the House Banking and Currency Committee, 90th Cong., 1st Sess. (1967). Furthermore — and most significantly — a survey of reported state usury cases confirms that the vast majority of instances of usurious lending occur in a violence-free atmosphere.[15]

Plainly, then this is not a situation such as that faced in *Turner* in which the available data indicated that virtually *no* illegally marketed heroin — indeed, *less than 1 per cent* (396 U.S. at 414) — is domestically produced. On that

[14] See, *e.g.*, Senate Hearings 9, 20-21, 39, 66-67, 71, 103-104. See also New York State, Temporary Commission of Investigation, An Investigation of the Loan Shark Racket 16, 78 (1965).

[15] Following is but a small sample of reported state unsury cases involving no threats or use of violence: *People* v. *Rastelli*, 37 N.Y. 2d 240 (N.Y. 1975); *State* v. *Bosworth*, 197 A.2d 477 (Vt. 1973); *Commonwealth* v. *Derstine*, 203 A.2d 372 (Penn. 1964); *Nash* v. *State*, 123 So. 2d 24 (Ala. 1960); *Tribble* v. *State*, 80 S.E. 2d 711 (Ga. App. 1954); *Young* v. *Barker*, 342 P. 2d 150 (Kan. 1959); *State* v. *Miller*, 279 P. 2d 223 (Kan. 1955); *Chakford* v. *Sturm*, 65 So. 2d 864 (Fla. 1953); *State* v. *Associates Discount Corp.*, 77 N.W. 2d 215 (Neb. 1956); *People* v. *Coleman*, 59 N.W. 2d 276 (Mich. 1953); *State* v. *Sargent*, 256 S.W. 2d 265 (Mo. 1953); *Gifford* v. *State*, 229 S.W. 2d 949 (Tex. Civ. App. 1950); *Texas Finance and Thrift Assn.* v. *State*, 224 S.W. 2d 522 (Tex. Civ. App. 1949).

In the event that certiorari is granted, petitioner will present a detailed statistical analysis of the relationship between usury and violence in all the reported cases.

empirical record, the Court was able to conclude that "those who traffic in heroin will *inevitably* become aware that the product they deal in is smuggled" (396 U.S. at 417; emphasis added) and, therefore, that the statutory presumption concerning heroin was valid. Here, because the data does not establish such inevitability — and on the contrary establishes that most reported usury cases involve no threats or use of violence — it is as "impossible" to determine "with substantial assurance" as it was in *Leary* that in any given case "the presumed fact is more likely than not to flow from the fact upon which it is made to depend.[16] And this is especially so where, as here, the record of the case is completely barren of any evidence that the particular lender on trial used or threatened to use violence, or was in any way connected with "organized crime." In such a case the operation of the bare statutory presumption must, contrary to the ruling of the court below, be deemed to violate due process of law.

If certiorari is granted in this case, petitioner will present massive evidence — of the kind considered in *Leary* — establishing beyond any doubt that the vast majority of high-interest loans in excess of $100, uncollectable through civil judicial process, are not accompanied by any threat of violence. Petitioner will demonstrate — what every law enforcement official already knows — that there exist two entirely distinct illegal money-lending markets in large cities: one that employs violence to collect; the other that relies on the desire of the borrower to maintain his credit with the lender so that he can continue to borrow from the non-violent usurers and not be relegated to borrowing from the

[16] Nor is it any answer to this conclusion that Congress *might* "legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn (*Leary*, 395 U.S. at 34); indeed, this Court specifically rejected that argument in *Tot*, 319 U.S. at 472.



violent extortionists.[17] That is why the vast majority of reported state usury cases do not carry any suggestion of violence. See p. 21, n. 15, *supra*. It is true that the Congressional hearings focused the spotlight of attention on the violent extortionists — and for understandable reasons. But the fact remains — a fact that petitioner will demonstrate in detail — that violent extortionate loans constitute a *minority* of the usurious loan transactions in this country.

[17] See, *e.g.*, testimony of Michael H. Metzger, Assistant District Attorney of New York City, Senate Hearings, *supra*, at 39:

> "Now, I want to make it clear that *not all loan sharks are affiliated with the organized underworld*. These are private loan sharks, just as there are private bookmakers, whose association with the organized underworld is extremely tenuous, if it exists at all. . . .
>
> "Obligations incurred by borrowers dealing with unaffiliated loan sharks, as I say, are not collected by extortive methods in most instances, and therefore they are not made as freely. If you could back up your collection efforts with physical violence — then you are going to be much more reluctant to loan out money. . . .
>
> "*It is generally agreed that most loan-shark transactions are amiably conducted with both parties being satisfied*. These transactions never come to the attention of the authorities in any way, and there are many that look at the local loan sharks as a desirable, even necessary institution. However, there are enough situations where the borrower becomes so enmeshed with the shark that he cannot get out from under. Where the shark is affiliated with the organized underworld the consequences of such delinquency are always serious." (Emphasis added.)

Non-violent usurious money lenders assume a variety of forms: some of them operate "check cashing" services; some operate "legitimate" small loan institutions but charge excessive rates "under the table"; some are simply fellow workers at factories. See, *e.g.*, Pennisi, Carolyn M., "Loan Shark Problem in Atlanta, Georgia," 19 Law & Cont. Problems 94, 95 (1954); Collins, Jackson R., "Evasion and Avoidance of Usury Laws," 8 Law & Cont. Problems 54, 56 (1941); Berkhead, Joe B., "Collection Tactics of Illegal Lenders," 8 Law & Cont. Problems 78 (1941).

C. *Even if it Were Concluded that the Statutory Presumption of § 892(b) Met the Minimum Standard of "More Likely than Not," the Proved Facts of a Usurious Loan and the Borrower's Beliefs Cannot Support an Inference in this Case that the Petitioner Possessed the Requisite Extortionate "Understanding" "Beyond a Reasonable Doubt."*

In *Leary*, 395 U.S. at 36, and *Turner*, 396 U.S. at 405, and again in *Barnes* v. *United States*, 412 U.S. 837, 842-843 (1973), this Court expressly reserved the question whether a presumption in a criminal case which meets the minimal constitutional standard of "more likely than not" must also meet the more rigorous standard of "beyond a reasonable doubt" in order to accord with due process. In those cases, it was unnecessary for the Court to reach the "reasonable doubt" question because the Court found either that the presumption at issue failed to meet the less stringent "more likely than not" test (*Leary*; *Turner*, cocaine presumption) or succeeded in meeting both tests (*Turner*, heroin presumption; *Barnes*). Here, if it should be concluded — against all rationality and empirical reasoning — that the presumption of the lender's extortionate "understanding" satisfies the standard of "more likely than not," the reserved question must be reached: the presumption as applied in this case cannot possibly pass constitutional muster when judged by the standard of "beyond a reasonable doubt." See *In re Winship*, 397 U.S. 358 (1970).

On the record of this case — a record totally devoid of evidence that in extending the high-interest loan to Pallotta the petitioner threatened or intended to threaten violence or that petitioner was a member of "organized crime" — it simply cannot be said that the bare fact that petitioner *made* the loan, coupled with Pallotta's *belief* that petitioner had a *past* reputation for violence, can support an inference "beyond a reasonable doubt" that petitioner intended, in extending this loan, to collect by extortionate means. Indeed, on this record a reasonable juror *must* entertain a reasonable doubt; for in the absence of evidence of threatening words or conduct on petitioner's part, it must be assumed that Pallotta's belief may have been *mistaken* — that although he believed that petitioner had a "reputation" for violence he was wrong and petitioner had no such reputation; or that although petitioner had such a "reputation," it was undeserved. This is especially so since the district court cut off all cross-examination as to the basis and source of Pallotta's belief (see pp. 26-30, *infra*), thus leaving the jury to speculate as to the "reasonableness" of that belief. The very real possibility in this case that Pallotta, even if telling the truth to the jury, was *in fact wrong* about the petitioner necessarily requires the finding of a reasonable doubt.



Moreover, since the district court admitted the testimony as to Pallotta's beliefs "subject to the limitation that it could be considered only as to Pallotta's state of mind" (App. 4a), the jury could not properly have relied on a finding of that "proved fact" to infer the existence of the "ultimate fact" of petitioner's "understanding." Thus, to uphold petitioner's conviction on the basis of the § 892(b) statutory presumption, it must be concluded either that the jury violated the district court's instructions and improperly relied on Pallotta's belief to infer petitioner's state of mind; or, that the jury relied solely on the three remaining "prima facie" factors, leaping to an inference of extortionate understanding from the mere fact that a usurious loan — *not* a crime under that statute — had been made. In either case, the jury's verdict of guilt cannot be sustained under the standard of "beyond a reasonable doubt."

II. THE DENIAL TO PETITIONER OF THE RIGHT TO INQUIRE, ON CROSS-EXAMINATION, AS TO THE BASIS AND SOURCE OF THE BORROWER'S BELIEFS ABOUT THE DEFENDANT'S REPUTATION FOR VIOLENCE, VIOLATES THE PRINCIPLES OF THE SIXTH AMENDMENT RIGHT TO CONFRONTATION.

As the court below explicitly recognized, "the borrower's reasonable belief regarding the lender's reputation for collection practices could have direct substantive significance" under 18 U.S.C. § 892(b) (App. 11a). Indeed, by upholding petitioner's conviction on the basis of the § 892(b) statutory presumption, the court of appeals in effect treated "the borrower's reasonable belief regarding the lender's reputation" as a required element of the charged offense. Moreover, Pallotta, the borrower whose "reasonable beliefs" were at issue in the case, was himself the star prosecution witness — the witness whose testimony "provided 'a crucial link in the proof . . . of petitioner's act.'" See *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974), quoting *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965). As this Court explicitly recognized in *Davis* v. *Alaska*, "[t]he accuracy and truthfulness" of a chief government witness' testimony are themselves "key elements" in the case against a defendant. 415 U.S. at 317. Yet the court below concluded that it was not reversible error for the trial court to cut off cross-examination of Pallotta about the source and basis of his crucial beliefs. This conclusion flies in the face of the prior decisions of this Court and does violence to the principles of the Sixth Amendment right to confrontation.

It is settled, certainly since *Davis* v. *Alaska*, that a criminal defendant is entitled, under the confrontation clause, to have a full and meaningful opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness" 415 U.S. at 318. Indeed, "[c]ross-examination is the principal means by which the



believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska*, 415 U.S. at 316; see also *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Gordon* v. *United States*, 344 U.S. 414 (1953); *Alford* v. *United States*, 282 U.S. 687 (1931).

Here it was, as the court of appeals explicitly recognized, "imperative that [petitioner] be permitted to explore the basis for the debtor's belief and to attack or otherwise challenge the borrower's testimony" (App. 19a). As the court of appeals further recognized, the method chosen by the defense to meet this need — *i.e.*, questioning of Pallotta "as to the specific persons who served as his sources" of information about the petitioner's reputation — is one which "many courts have held . . . permissible" (App. 19a). Indeed, long ago in *Scott* v. *United States*, 172 U.S. 343 (1899), this Court noted that it was "admissible, upon cross-examination, for the purpose of showing the improbability of [an] explanation, to obtain from the witness all the circumstances which might throw light upon the subject." *Id.* at 348.

Nor is the court of appeals correct that "[i]f Pallotta had been required to answer, appellant would have had to *accept whatever responses were given*, inquiry as to whether any or all of the named sources had actually given him the information being clearly collateral" (App. 20a; emphasis added). In *Scott*, the witness (actually the defendant), cross-examined by the government as to the identity of those whom he claimed were his "enemies," named two persons. Over defense objection, the government then called these two persons to the witness stand to contradict the defendant's testimony. The court rejected defendant's contention "that the evidence of the defendant upon this subject was collateral, brought out by the Government on his cross-examination, and that the Government was bound by his answers" (172 U.S. at 347), stating:

> "To show that no such inference could properly be drawn, the Government proved that the men the de-

> fendant named as enemies were not such in fact. . . . [The defendant's direct] examination suggested an explanation which, if believed, showed an innocent possession, and however improbable it was "*the Government had the right to pursue the subject and to show that it was unfounded*" (172 U.S. at 348).

So, too, the petitioner here had the "right to pursue the subject" — *i.e.*, Pallotta's claimed belief that petitioner had a reputation as a loan shark — "to show that it was unfounded"; the conclusion of the court of appeals that "[s]ince it appeared that Pallotta could have given names, the inquiry would probably have availed [petitioner] little" (App. 21a) is, under *Scott*, simply wrong.

Moreover, while a trial judge may still be permitted discretion to control the range and extent of cross-examination, that discretion may not, consistent with the Sixth Amendment, be exercised in a way which effectively eliminates jury consideration of a key issue.[18] Recent decisions of the federal courts of appeals decided under *Davis* v. *Alaska* have underscored this point. Thus, in *United States* v. *Callahan*, 551 F. 2d 733, 737 (6th Cir. 1977), the court, acknowledging the discretion of the trial judge in this area, did not hesitate to find:

> "But where, as here, the court's restriction prevented defense counsel from cross-examining the government's chief witness as to his credibility and the veracity of his

[18] As was noted in *Dixon* v. *United States*, 333 F. 2d 348, 353 (5th Cir. 1964),

> "[Although] [i]t is often stated that the control of cross-examination is within the discretion of the trial judge, . . . it is only *after* a party has had an opportunity substantially to exercise the right of cross-examination that that discretion becomes operative." (Emphasis added.)



> testimony *on a required element* of the charged offense, the defendant has been denied his Sixth Amendment right of confrontation." (Emphasis added.)

See also *United States* v. *Rice*, 550 F. 2d 1364, 1371 (5th Cir. 1977); *United States* v. *Segal*, 534 F. 2d 578, 582 (3d Cir. 1976).

In *Davis* v. *Alaska* itself the trial court did not completely foreclose all cross-examination efforts in the area at issue, and, in fact, the Alaska Supreme Court had concluded "that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury" (415 U.S. at 318). This Court, however, recognizing that, at the very least, the restriction on cross-examination truncated the evidence from which defense counsel could have argued bias to the jury, held that:

> "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it.*'" 415 U.S. at 318 (emphasis added), citing *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966).

Yet here the trial court's exercise of discretion in cutting off inquiry as to the source and basis of Pallotta's beliefs did not merely truncate the evidence from which the defense could have attempted to impeach Pallotta generally; it totally deprived the defense of the evidence it needed to demonstrate that Pallotta's testimony was thoroughly unreliable on a "required element" of the crime charged. Particularly in light of the dispositive significance given by the court of appeals to the evidence of the borrower's beliefs, it is especially surprising and unjustifiable that the court was able to conclude that petitioner was not prej-

udiced by this foreclosure. However, since there can be no doubt that, in fact, petitioner was "denied the right of effective cross-examination" on a "key" aspect of the case, "no amount of showing of prejudice [could] cure it," and the decision of the court of appeals to the contrary is wrong.

## III. The Decisions Below Announce an Unprecedented Interpretation of the Federal Rules of Evidence, Which — Contrary to the Decisions of this Court, the Intent of Congress, the Principles of the Sixth Amendment Right to Confrontation, and Recent Decisions of Other Circuits — Eliminates the Need to Demonstrate by "Independent Evidence" the Existence of a Conspiracy Between the Defendant and the Declarant Before Allowing Hearsay to be Introduced Against the Defendant Under the Co-Conspirator Exception to the Hearsay Rule.

### A. *Introduction.*

Rule 801(d)(2)(E) of the new Federal Rules of Evidence codifies the co-conspirator exception to the hearsay rule (see Advisory Committee Notes to Rule 801; *United States* v. *Smith*, 520 F. 2d 1245, 1247, n. 2 (8th Cir. 1975)); and Rule 104(a) provides that preliminary questions of admissibility shall be determined by the trial court. When read in connection with Rule 801(d)(2)(E) the primary thrust of Rule 104(a) is therefore to allocate to the trial court the function of determining whether the factual predicate to the co-conspirator exception is sufficiently proved to admit the hearsay against the defendant. In making that determination the trial court is released by Rule 104(a) from restrictions imposed by "the rules of evidence," including the operation of normal strictures against relying on hearsay evidence. Contrary to the interpretation given to this rule



by the court of appeals, however, this release from "the rules of evidence" does not contemplate a release from the rule that a conspiracy must be proved by "independent evidence" before it can be used as a predicate to the admission of co-conspirator hearsay — a rule of law established by this Court in *Glasser* v. *United States*, 315 U.S. 60 (1942), reiterated by this Court as recently as its decision in *United States* v. *Nixon*, 418 U.S. 683, 701 (1974), and buoyed by the principles of the Sixth Amendment right to confrontation.

### B. *In Enacting the New Federal Rules of Evidence Governing the Co-Conspirator Exception to the Hearsay Rule, Congress did Not Intend to Overrule or to Subvert the "Independent Evidence" Requirement Established by this Court in Glasser v. United States, 315 U.S. 60 (1942).*

The legislative history of the new Federal Rules of Evidence establishes that in enacting both Rules 104(a) and 801(d)(2)(E) Congress intended essentially to codify the common law.[19] Article I of the Rules, in which Rule 104(a) appears, is, in fact, considered to be "the best example of a section of the new Code that requires reference to common law doctrine [as an interpretive aid]. . . . And there is every indication that this is what Congress intended." Redden and Saltzburg, at 412. It is also recognized that, with respect to the operation of Rule 801(d)(2)(E), "common law doctrine may be necessary to fill in certain gaps." *Id.*

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[19] See K. Redden and S. Saltzburg, *Federal Rules of Evidence Manual* (1975), at 19-21, 250, 412, 413; Advisory Committee's Notes to Rules 104(a), 801(d)(2)(E); Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess.; Statement of Edward W. Cleary, Reporter for the Advisory Committee on Federal Rules of Evidence, House Hearings Supp. at 91-92 (1973); and letter from Senator McClellan, House Hearings Supp. at 56-59 (1973).

at 413. Since neither Rule 104(a) nor Rule 801(d)(2)(E) makes any explicit mention of a requirement of "independent evidence," this silence or "gap" in the Rules must — in accordance with Congressional intent — be filled by reference to, and, if possible, in a manner *consistent* with, the common law doctrine. The essential question thus posed by the decisions of the court of appeals is whether Rule 104(a), read in conjunction with Rule 801(d)(2)(E), can be interpreted in a manner *consistent* with the ruling in *Glasser*.

To answer this question in the affirmative it is only necessary to recognize that the purpose underlying the "independent evidence" requirement is not to prevent the use of hearsay in general; it is simply to prevent the bootstrapping of a *particular item of hearsay* to the level of competent evidence against the defendant by reliance on *that very* item. See *Glasser*, 315 U.S. at 75. In other words, *Glasser* proscribes reliance on the contents of the statement seeking admission not because it is hearsay, but because it is *non-independent*. Read in light of this purpose, it is clear that Rule 104(a) is entirely consistent with *Glasser*. While the Rule allows the use of hearsay in general in making preliminary determinations of admissibility, it does not require that the trial court *must* use hearsay in determining whether the co-conspirator exception applies, nor, moreover, that the trial court *must* use the particular item of hearsay whose admissibility is in question. Simply put, while the Rule frees the trial court from ordinary evidentiary strictures against the use of hearsay evidence, it does not free the court from the special strictures in a conspiracy case against the use of *non-independent* evidence.[10]

[10] Weinstein has also noted:

> "The last sentence of [Rule 104(a)] is not an open invitation to ignore the rules of evidence. Rather, it calls for good sense to suit the needs of speed and convenience at the trial. In many instances the evidence considered by the court will also have to be considered by the jury — as for example in determining the existence and membership of a conspiracy for admission of coconspirator's hearsay . . .. Since, in such cases, the court must decide whether a reasonable jury could decide for the proponent it makes sense on the preliminary determination only to consider the same evidence the jury will have before it — i.e., admissible evidence." 1 Weinstein, *Evidence*, ¶104[3] at 104-25.



Moreover, statutory silence cannot be used to justify a judicial interpretation eliminating a long-standing evidentiary rule which protects criminal defendants. This Court has noted that when Congress acts in an area in which it would certainly be aware of the existence and importance of a pertinent issue, the *absence* of a reference to that issue cannot be used to read into the statute an affirmative intent to restrict the rights of criminal defendants. See *Rewis* v. *United States*, 401 U.S. 808, 812, 813 (1971). See also *Bell* v. *United States*, 349 U.S. 81, 83 (1955). The Court in *Rewis*, *supra*, was "struck by what Congress did not say." The same is true here. Plainly, had Congress intended in enacting the new Rules to overrule the principle announced in *Glasser*, it could have said so. In the absence of an express statement to that effect, it simply cannot be *presumed* that Congress intended to eliminate the protection which *Glasser* affords.

### C. *The Elimination of the Glasser "Independent Evidence" Requirement would Run Afoul of Constitutional Considerations Arising from the Sixth Amendment Right to Confrontation.*

As this Court has recognized, hearsay evidence introduced against a criminal defendant under an exception to the hearsay rule must meet the standards of the Sixth Amendment right of confrontation. See *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *California* v. *Green*, 399 U.S. 149, 155-156 (1970). The test of constitutionality is whether the hearsay statements in question are surrounded by sufficient "indicia of reliability" so that the absence of cross-examina-

tion does not deprive the jury of "a satisfactory basis for evaluating the truth" of the extra-judicial declarations. *Dutton* v. *Evans*, 400 U.S. at 89.

In the case of hearsay statements made by an alleged co-conspirator, it is precisely the "independent evidence" requirement announced in *Glasser* which provides the most meaningful assurance of reliability. The special danger that a hearsay statement implicating an alleged co-conspirator may be "idle chatter" or "inadvertently misreported or deliberately fabricated evidence" is well recognized. See Weinstein, *supra*, ¶801(d)(2)(E)[01] at 801-145; Davenport, "The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis," 85 Harv. L. Rev. 1378, 1398 (1972).[11] The greatest protection *against* that danger is the guarantee that the statement at issue was uttered "during the course of and in furtherance of" an existing conspiracy. Weinstein, *supra*, ¶801(d)(2)(E)[01] at 801-145, 148. Plainly, however, the contents of the hearsay statement seeking admission cannot itself be relied upon for providing the necessary assurance that the statement was made as part of an existing conspiracy because the very aspect of the statement which may appear to give rise to such an assurance may itself be "idle

[11] As explained by Davenport:

> "The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or none at all, may be a cover for concealment purposes . . . , or may represent an effort to gain some personal revenge." *Id.* at 1396.

See also Levie, "Hearsay and Conspiracy," 52 Mich. L. Rev. 1159, 1165-55 (1954); Comment, "The Hearsay Exception for Co-Conspirators' Declarations," 25 U. Chi. L. Rev. 530, 540, 541 (1958); Note, "Preserving the Right to Confrontation," 133 U. Pa. L. Rev. 741, 756 (1985); New Jersey Supreme Court, Committee on Evidence, 167 (1963), quoted in Weinstein, *supra*, at 801-144.



chatter" or "inadvertently misreported or deliberately fabricated evidence." Indeed, unless the evidence that the statement was uttered as part of an existing conspiracy is *itself reliable* evidence, the assurance that the *content* of the statement is reliable is seriously, if not fatally, undermined. For this reason, the "independent evidence" requirement is, and must remain, the underpinning of that reliability determination. Simply put,

> "The extent to which the reliability of the hearsay at issue is guaranteed depends upon the reliability and probative value of the *independent* evidence actually presented." Davenport, 85 Harv. L. Rev., *supra*, at 1389 (emphasis added). See *United States* v. *Puco*, 476 F. 2d 1099, 1109 (2d Cir. 1973).

Accordingly, to assure that the constitutional standard of reliability is satisfied — and to assure that the "already pervasive and wide-sweeping nets of conspiracy prosecutions" are not broadened even further (see *Dutton* v. *Evans*, 400 U.S. at 82) — the "independent evidence" requirement must remain a vital one in the federal courts.

### D. *The Interpretation of the "Independent Evidence" Requirement Rendered by the Court Below Conflicts with Recent Opinions of the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits.*

Since the effective date of the new Federal Rules of Evidence, July 1, 1975, numerous appellate decisions have dealt with the admissibility of out-of-court declarations of alleged co-conspirators. Without exception, not one court of appeals decision — other than the decisions of the court below — has even suggested that the doctrine of *Glasser* has been undercut in any way by the enactment of the Rules. On the contrary, cases decided under the new Rules

by the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits have reiterated the requirement that the admission of extra-judicial co-conspirator statements be predicated upon "a sufficient showing" of a conspiracy between the defendant and the declarant by evidence "*independent*" of the statements in question.

The court of appeals itself listed the relevant precedents, stating:

> "Although we entertain these doubts about *Glasser's* survival, we note that other courts have assumed that the new federal rules have not affected *Glasser* in the slightest. *See United States* v. *Stanchich*, 550 F. 2d 1294, 1298-99 n.4 (2d Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976); *United States* v. *Stroupe*, 538 F.2d 1063, 1065, 1066 (4th Cir. 1976); *United States* v. *Savell*, 546 F.2d 43, 46-47 (5th Cir. 1977); *United States* v. *Burgard*, 551 F.2d 190, 196 (8th Cir. 1977); *United States* v. *Wood*, 550 F.2d 435, 442 (9th Cir. 1977)." (App. 29a, n. 2.)

Although, as the court of appeals noted (*id.*), the decisions of the other circuits did not "specifically" consider the question whether *Glasser* has survived, those decisions leave no doubt that the *Glasser* doctrine continues to be applied, and, indeed, has been expressly incorporated in judicial interpretations of the new Rules of Evidence.



**Conclusion.**

For all the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## Appendix.

## UNITED STATES COURT OF APPEALS

## FOR THE FIRST CIRCUIT

No. 76-1372

UNITED STATES OF AMERICA,
APPELLEE,

*v.*

JAMES MARTORANO,
APPELLANT.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, *U.S. District Judge*]

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Before Coffin, *Chief Judge*,
Aldrich and Campbell, *Circuit Judges*.

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*Joseph S. Oteri*, with whom *Oteri & Weinberg*, *Alan M. Dershowitz*, *Jeanne Baker*, and *Rosenberg, Baker & Fine* were on brief, for appellant.

*Dennis A. Winston*, Attorney, Department of Justice with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney Boston Strike Force, and *Mervyn Hamburg*, Attorney, Department of Justice were on brief, for appellee.

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*March 30, 1977.*

COFFIN, *Chief Judge*. James Martorano appeals from the judgment of conviction which was entered against him on each count of a four count indictment. Counts one and two charged appellant with conspiring to make, and with making, an extortionate extension of credit in violation of 18 U.S.C. § 892(a). Count three charged conspiracy to use extortionate means to collect an extension of credit in violation of § 894(a). Count four charged appellant with one particular act of using extortionate means to collect an extension of credit. Appellant challenges the sufficiency of the evidence to support the convictions on each of the four counts, and he argues that the district court made a number of erroneous evidentiary rulings. We affirm.

The charges in this case stem from a loan appellant allegedly made to one Peter Pallotta. The government's evidence, viewed in the light most favorable to it, reflects the following. Pallotta had been running a highly unsuccessful nightclub, and, in late August or early September, 1974, he found himself in need of $2000 to pay some pressing debts. Pallotta's brother took him to see appellant, who agreed to make Pallotta a $2000 loan at five percent interest per week. Told by appellant to return to pick up the money, Pallotta came back the next day and met with appellant and one Matera. Appellant gave Pallotta the money and instructed Matera to go to Pallotta's club each Friday at 7:30 to pick up the weekly payments. No papers were signed, and no collateral was given.

During the next four weeks, Pallotta made the interest payments as follows: once he paid appellant at appellant's club; twice Matera came to Pallotta's club and picked up the money, and once Matera and one Pagano together came to Pallotta's club and received the payment. Sometime in October, Pallotta was forced to close his club for renovations for four weeks, and during this period he did not make any



payments. The club reopened on October 30. On that night, appellant and co-defendant Halloran, who was acquitted on all the charges, appeared at Pallotta's club. Because he feared the embarrassment of a beating in his own club, Pallotta left. The next day Pallotta received a telephone call from an unnamed source warning that Pallotta should make himself available to appellant that night. That night Halloran allegedly approached Pallotta in the parking lot outside the club and said that appellant had sent him to get the money. When Pallotta protested that he had no money, Halloran pulled a gun, took Pallotta with him outside the club, and removed some $450 from two separate cash boxes.

Three days later, Pallotta went to see appellant, who asked Pallotta what he was going to do. When Pallotta responded that he had to pay, appellant responded: "Don't be late and see me every week and if you're not going to be here, I want a phone call from you."

Sometime shortly thereafter, Pallotta's club was permanently closed. Because he lacked a source of income and feared physical harm at the hands of several loan sharks, including appellant Pallotta went into hiding and began living in his car. In late November, 1974, Pallotta contacted the FBI. With Pallotta's consent, the FBI recorded a series of telephone conversations of Pallotta with Halloran, Matera, Pagano, and appellant. In their conversation appellant suggested that Pallotta stop by and see him. When Pallotta expressed his fear of being harmed, appellant replied:

> "Don't talk like that on the phone.
>
> . . . . . .
>
> You can come any time. What do you think I'm gonna do something 'round my own place? Be kind of

stupid wouldn't it? Ah, first chance you get drop by and see me."

The conversations between Pallotta and Pagano generally verified the existence of the loan and revealed that Pagano and Matera had supplied half of the money which had been loaned Pallotta.

At the trial Pallotta testified as to the reputations of each of the various individuals who allegedly were involved in the transaction. Pallotta testified that appellant was a loan shark and was "100 per cent in getting his collections back. . . . Nobody missed. If they did, they got hurt." As to Matera and Pagano, Pallotta testified that they had worked together in a loan shark operation for many years and that if any of their borrowers were ever late in repaying a loan, they would hurt the borrower. Pallotta also stated he had known Halloran for a long period of time and that Halloran was "a loan shark, collector and enforcer and a madman" and that he collected for appellant. This reputation testimony was all admitted subject to the limitation that it could be considered only as to Pallotta's state of mind. Finally, Pallotta testified that at the time he accepted the extension of credit he knew he would be physically harmed if he failed to repay on time.

## I. Sufficiency of the Evidence

Section 892 proscribes the making of extortionate extensions of credit, which § 891(6) defines as "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making the repayment could result in the use of violence or



other criminal means to cause harm to the person, reputation, or property of any person." Appellant attacks his conviction under count two on the theory that the record is entirely void of any evidence indicating that he understood that Pallotta's failure to make timely repayments could result in the use of force or violence against Pallotta. The short answer to this argument is § 892(b), which declares that there is prima facie evidence that an extension of credit is extortionate if the following facts exist: (1) repayment is unenforceable through normal judicial processes; (2) the loan's interest rate is in excess of 45 percent per year; (3) the amount of the loan exceeds $100; and (4) the borrower reasonably believed that the lender has used extortion to collect other debts or that the lender has a reputation for doing so. There plainly was evidence from which the jury could conclude that each of these factors was present. Since there is no constitutional bar to permitting a jury to infer from the coexistence of these four facts that the lender understands that violence will follow nonrepayment of the loan, *United States* v. *De Vincent*, 546 F.2d 452, 455 (1st Cir. 1976), we conclude that there was sufficient evidence of appellant's guilt.

Appellant recognizes the force of this argument, but urges that we may not affirm on this theory because the jury was not expressly instructed in terms of § 892(b)'s permissive inference. This contention is without merit. The court's charge to the jury stated that appellant could not be found guilty unless the jury found beyond a reasonable doubt that the aforementioned extension of credit had occurred and that Pallotta had a reasonable apprehension he might suffer harm if he failed to make his payments on time. The judge noted that the rate of interest on the alleged loans was to be 260 percent and that there were no legal means by which appellant could have collected the loan, and he told the

jury that it could give "such weight as [it deemed] appropriate" to these facts. This portion of the charge apprised the jury of § 892(b)'s permissive inference without needlessly confusing them with the concept of "prima facie case". Appellant did not object to this portion of the charge, and since the charge cannot be said to be plain error, appellant may not attack the judgments of conviction on count 2 on this ground.[1]

But we need not rest our decision on this ground alone, for there was evidence from which the jury could infer that appellant understood that violence would accompany the repayment of this loan. The statements appellant made during the recorded telephone conversations could suggest to reasoning minds that the use of violence against borrowers, like Pallotta, who had failed to make timely payments, was a familiar practice for appellant and, indeed, that it was such a familiar practice that he feared that the government might be investigating him.[2] These statements, together with the nature of the loan and the other facts in evidence, warranted a jury conclusion that appellant did in fact understand that violent measures might be employed if Pallotta failed to make a repayment.

It having been established that appellant loaned the money to Pallotta with the understanding that any delay in the repayment thereof could result in the use of violence, the next question we must face is whether there was sufficient evidence on count one, which charged that appellant

[1] Here, as in *United States* v. *De Vincent*, *supra*, the judge's charge left no doubt but that the ultimate fact which was in issue was whether an extortionate extension of credit had occurred.

[2] We recognize that these statements were made several months after the loan, but we see no problem with using them as evidence of appellant's state of mind at the time of the original extension of credit. *See generally* 6 Wigmore on Evidence § 1732 at 103-04.



conspired with Halloran, Metera, or Pagano to make this extortionate extension of credit to Pallotta. We focus on Matera, and we find ample evidence supporting the jury verdict.

Matera, who had a reputation as a loan shark in his own right, collected the weekly interest payments from Pallotta for appellant. While the fact of having made collections as such might not be sufficient to make one a co-conspirator, *cf. United States* v. *Annoreno*, 460 F.2d 1303, 1309 (7th Cir. 1972), here the jury could have reasonably concluded that Matera was not simply appellant's errand boy, but that he was privy to the terms of the extension of credit, was the principal collector, and must have shared appellant's understanding that violence might follow if Pallotta failed to make a repayment. Because Matera was present at the time Pallotta received the $2000 from appellant and because he also made the weekly interest payment collections, there was evidence from which the jury could infer that Matera knew it was a $2000 loan at 260 percent interest which had not been documented in writing and which had not been secured by any collateral. As the man responsible for the weekly collections, we think the jury was also entitled to assume that he understood both from appellant and from the nature of the loan that violent measures might have to be used to ensure that repayments occurred as scheduled.[3]

[3] The district court's unobjected to instructions on the conspiracy counts referred to Pallotta's fearful state as an element of the crime. Appellant argues that this instruction was plain error because the actual understanding of the victim need not be proved to establish conspiracy to make an extortionate extension of credit. *See United States* v. *Annoreno*, *supra* at 1309 n. 7. We find no plain error. Although appellant is correct that the ultimate fact to be proved under a conspiracy count is the intent of the alleged co-conspirators, it is not necessarily the case that the mental state of the victim is irrelevant to this determination. Under § 892(b), the victim's understanding is one of the factors

Count four charged Martorano with having used extortionate means to collect an extension of credit by ordering Halloran to "burglarize" Pallotta's club on or about October 31, and count three charged him with conspiracy to collect an extension of credit by extortionate means. The record plaintly contains substantial evidence both that a "larceny" occurred and that it was at appellant's direction. There would seemingly be no question but that the judgments of conviction on both counts were supported by sufficient evidence.

A problem arises, however, because the jury acquitted Halloran on both counts three and four. Appellant urges that the jury must be taken as having rejected Pallotta's account of Halloran's actions. He contends that the guilty verdict on count four must be set aside because Pallotta's account of Halloran's actions is the only evidence against appellant and that the conspiracy conviction under count three may not be upheld on the theory he conspired with Halloran. Appellant understands that it has been settled in the federal courts since *United States* v. *Dunn*, 284 U.S. 390 (1932) that a jury verdict may not be set aside on the ground that it is inconsistent with a second verdict that was simultaneously rendered, *see also Hamling* v. *United States*, 418 U.S. 87, 101 (1973), but he argues that there should be an exception to this general rule here where, in his view, the court's instructions permitted the jury to return a guilty verdict against Martorano only if it first found Halloran guilty.

Even if we were disposed to create such an exception to the rule of *United States* v. *Dunn*, it would not aid ap-

from which the jury may infer the lender's intent, and we cannot say it was plain error for the district court to permit the jury to consider the victim's understanding in this context as well.



pellant. While it is true that the district court's charge at one point stated that appellant should be found guilty if the jury concludes that Halloran had gone to Pallotta's club at appellant's direction, the thrust of the charge was that appellant should be found guilty if he performed the illegal act through the agency of another person. A major issue at the trial was whether there was sufficient evidence identifying Halloran as the assaillant — this being one aspect of Pallotta's account which was not corroborated by the witnesses inside the club. Here, the jury could have consistently reached its verdicts by accepting every aspect of Pallotta's testimony except the portion that identified Halloran as the assailant.[4]

But we need not rest our decision on this ground. The settled rule in the federal system is that it is the prerogative of the jury *simultaneously* to return inconsistent verdicts. We have been cited to no case which recognizes the exception appellant urges us to adopt, and any such exception, in our view, would be both unwise and arguably inimical to the interests of criminal defendants generally. The present rule permits the jury to enter into compromises and to act out of leniency; if it were to be changed, the jury would have to be instructed that any inconsistencies in their verdicts would vitiate any guilty verdicts they might return, and the net result might be that fewer defendants would be acquitted on individual counts. And such an exception would be unwise. The jury's deliberations have always

[4] The judge's instructions indicated that the indictment stated the actual charges. Both counts three and four referred to unknown individuals who had been involved in the alleged criminal activity. The jury verdicts thus would have been consistent with the judge's charge if the jury had concluded that appellant's agent and co-conspirator was not Halloran but one of the unknown individuals referred to in the indictment.

been regarded as sacrosanct, and the adoption of appellant's proposed exception would undermine the strong policy against probing into the jury's logic or reasoning and would open the door to interminable speculation.[5] *See United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974). Accordingly, we decline to accept appellant's invitation.

## II. Evidentiary Rulings.

1. As we have noted, the district court permitted Pallotta to testify concerning Martorano's reputation for collection practices. Appellant does not object to the introduction of this testimony per se, but he argues, first, that the district court erred in admitting the testimony without first conducting a voir dire to determine the reasonableness of the answers Pallotta was to give, and second, that it compounded the error by prohibiting appellant from testing the reasonableness and basis for the reputation testimony. Neither contention has merit.

Under general principles of evidence law, reputation testimony is properly admitted if the witness is shown to live and work in the same community as the subject of the testimony and if the witness is familiar with the subject's reputation for a particular pattern of behavior. *See Whiting* v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961) and authorities cited. Common law evidence principles do not require the judge to make a preliminary determination concerning the reasonableness of any particular answer.

[5] The cases appellant relies upon, *see Sealfon* v. *United States*, 322 U.S. 575 (1948); *cf. United States* v. *Zane*, 495 F.2d 683, 691-92 (2d Cir. 1974), involve the very different situation in which a prior jury verdict is held to have a res judicata effort and to bar a *subsequent* prosecution.



Here, the admission of the reputation evidence was authorized by § 892, and it does not purport to create a contrary rule.[6] *See generally United States* v. *Bowdach*, 501 F.2d 220, 225-26 (5th Cir. 1974). In the absence of any such provision, we assume Congress intended that these provisions be administered in accordance with normal evidentiary practice, and, under it, the admission of Pallotta's reputation testimony was entirely proper.

Appellant's second contention is based upon the district court's refusal to permit him to ask Pallotta the names of the individuals who had told him about appellant's collection practices. We observe that a party, of course, has the right to attempt to impeach or challenge any testimony concerning the reputation of an individual. And here, where the borrower's reasonable belief regarding the lender's reputation for collection practices could have direct substantive significance, *see* § 892(b), there is a particularly compelling need for permitting a defendant to explore the basis for the such belief or otherwise to challenge the debtor's testimony. But we believe the district court was entirely warranted in precluding inquiry into the specific individual sources of Pallotta's belief. There were a number of available, traditionally accepted devices by which appellant could have cast doubt on the reasonableness of Pallotta's belief: e.g., asking Pallotta whether he "had heard" of acts which were inconsistent with the testimony,

[6] Section 892(c) establishes several preconditions to the introduction of reputation testimony by witnesses other than the borrower, but there is no requirement that there be a preliminary showing that the answers are reasonable. *See also* § 894(c). Section 892(b)(3)(B) authorizes the debtor to testify as to the lender's reputation, *see United States* v. *Bowdach*, 501 F.2d 220, 225-26 (5th Cir. 1974). While this provision gives direct substantive significance to the debtor's reasonable belief as to the creditor's reputation, nothing therein suggests that the admissibility vel non of the borrower's testimony is to be governed by a special rule.

introducing testimony as to appellant's reputation which was contrary to Pallotta's or possibly, as appellant did below, introducing evidence of specific acts which were inconsistent with this supposed reputation. The availability of these gave appellant fully adequate protection.

Inquiry into the specific sources of Pallotta's belief was not only unnecessary to protect appellant; it would have availed appellant little. Even if the questioning had been allowed, it would have been unthinkable for the district court to permit the appellant to pursue collateral inquiry as to whether any or all of Pallotta's named sources had actually given him the information regarding appellant. The only possible benefit to appellant from the inquiry would have been that he could have forced Pallotta to state the names of specific individuals who had told him about appellant. We think there was good reason to deny appellant this minimal safeguard. The further inquiry could have involved the tedious and time consuming process of hearing all the sources of Pallotta's belief, and it possibly would have created a danger of some kinds of reprisals. We think the district court was well within its discretion. *Cf.* Fed. R. Evid. 403.

2. At trial the court permitted the government to introduce the statements Matera and Pagano made during recorded telephone conversations with Pallotta under the co-conspirator exception to the hearsay rule. Appellant objects that there had not been a sufficient prior showing that a conspiracy existed. We find no error.

We recently indicated our view that the new federal rules of evidence, which were in effect at appellant's trial, introduced significant changes in the administration of the co-conspirator exception to the hearsay rule. *See United States* v. *Petrozziello*, ____ F.2d ____ (1st Cir. Jan. 21, 1977). Without repeating what we said in that case, we read the



new rules as committing the question of the admissibility of the statements of an alleged co-conspirator exclusively to the trial judge. The district judge will admit the hearsay declarations if he determines, by a preponderance of the evidence, that a conspiracy existed, that the declarant and the defendant were members of it at the time that statements were made, and that the declarant's statements were made in furtherance of the conspiracy. *See* Fed. R. Evid. 104(a), 104(b), 801(d)(2)(E). The new rules permit a trial judge to base his determination on hearsay and other inadmissible evidence, including perhaps the very statement seeking admission. Fed. R. Evid. 104(a); *see United States* v. *Petrozziello*, *supra* at ____ n. 2 (slip op. at 5 n. 2).

Here, the trial court made a preliminary determination that there had been a sufficient showing of conspiracy to permit the introduction of the statements of Matera and Pagano, and if followed the pre-federal rules practice of instructing the jury that it could not consider the statements unless it first found that the independent nonhearsay evidence established the existence of a conspiracy beyond a reasonable doubt. Naturally, the only question we must now review is whether the district court erred in making the threshold determination that there had been a sufficient showing that a conspiracy existed to place the statements before the jury. *See United States* v. *Petrozziello*, *supra* at ____ (slip op. at 6). In making this decision, it seems that the district court may have followed the federal rules to the extent of considering evidence other than the independent nonhearsay variety; it allowed the government to argue in favor of the admissibility of some of the statements by referring to the evidence of a conspiracy contained in the statements seeking admission. Although the district court did not make an explicit finding that a conspiracy existed between appellant and the two declarants, appellant re-

quested no such finding and, in view of the fact that *Petrozziello* had yet to be decided, this was not plain error. *See id.* The sole question we need consider on appeal is whether there was sufficient evidence under Fed. R. Evid. 104(a) to support a finding that a conspiracy existed.

We have already detailed the evidence which was sufficient to permit the jury to find that Matera and Martorano had conspired together. Pagano presents a somewhat closer question. Pallotta testified that he and Matera had been partners in a loan shark operation for years,[7] testimony which was corroborated by the surveillance records. While this fact alone does not establish that Pagano was a member of the Martorano-Matera conspiracy, there is the additional fact that Pagano and Matera together went to Pallotta's club to collect one of the interest payments. In view of the evidence that the two men were long-time loan shark partners, we think it reasonable to infer that Pagano's presence on this particular occasion was not a coincidence, but rather was because Pagano was taking part in this particular extortionate extension of credit. While this independent, nonhearsay evidence of Pagano's involvement is not terribly compelling, we think the district court could properly take account of a fact which was revealed by the statements seeking admission: that Pagano and Matera had supplied half the money which Martorano gave Pallotta. This additional fact, when considered together with the independant nonhearsay evidence, provides a solid basis for a district court's conclusion that Pagano and appellant were involved in a conspiracy.

[7] Although this evidence was admitted subject to the limitation that it could only be considered as to Pallotta's state of mind, Fed. R. Evid. 104(a) permits the district court to consider such statements for their truth in determining the existence of the preliminary fact of the existence of a conspiracy.



We are aware that *United States* v. *Glasser*, 315 U.S. 60, 74-75 (1942), rejected the view that the existence of a conspiracy could be proved by the very statement seeking admission. The new rules, however, explicitly contemplate the consideration of such hearsay evidence in making preliminary findings of fact. We believe the new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists. *Glasser*, however, still stands as a warning to trial judges that such statements should ordinarily be given little weight. Here, where there is significant independent evidence of the existence of a conspiracy and where the statement seeking admission simply corroborates inferences which can be drawn from the independent evidence, we see no problem with the consideration of that statement.

We also are not persuaded by appellant's further argument that the tapes affirmatively disclose that Pagano had withdrawn from the conspiracy and that his declarations thus did not fall within the ambit of the co-conspirator exception. In the conversations, Pagano expressed his willingness to help arrange further payments to appellant, and we think the district judge reasonably inferred that Pagano was still a member of the conspiracy.

3. Next, appellant argues that the district court committed reversible error by refusing to permit him to cross-examine Pallotta regarding specific threats of harm which were made by loan sharks other than appellant. Appellant urges that Pallotta's answers to these questions would have tended to show that Pallotta had not been in fear of appellant at all, but rather feared harm solely from other loan sharks. We find no reversible error.

We think it doubtful that Pallotta's fear of other loan sharks was probative of whether he was in fear of appellant,

but even if the line of inquiry was a material one, we do not believe appellant can claim any prejudice. It was established at trial that Pallotta was terrified of several loan sharks other than appellant, and there was testimony from a government agent suggesting that these other men were the principal objects of Pallotta's fear. Since the jury was in possession of sufficient information concerning Pallotta's state of mind to make a judgment, the restriction on cross-examination was not reversible error. *See United States* v. *Turcotte*, 515 F.2d 145, 151 (2d Cir. 1975); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir. 1972).

None of the other points appellant raises require discussion.

*The judgment of conviction is affirmed.*

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1372

UNITED STATES OF AMERICA,
APPELLEE,

*v.*

JAMES MARTORANO,
APPELLANT.

---

ON PETITION FOR REHEARING

---

Before Coffin, *Chief Judge*,
Aldrich and Campbell, *Circuit Judges*.

---

*Joseph S. Oteri*, with whom *Oteri & Weinberg*, *Alan M. Dershowitz*, *Jeanne Baker*, and *Rosenberg, Baker & Fine* were on brief, for appellant.

*Dennis A. Winston*, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney Boston Strike Force, and *Mervyn Hamburg*, Attorney, Department of Justice were on brief, for appellee.

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*May 23, 1977*

COFFIN, *Chief Judge*. The petition for rehearing contains arguments directed to the sufficiency of the evidence and correctness of several of the district court's trial rulings. We will consider them in the order advanced in the petition.

I.A. Even assuming both that the court's instructions clearly provided that a finding that petitioner directed the robbery of Pallotta's club had to be predicated upon a prior finding that Halloran was the actor and that the jury disobeyed the instructions, petitioner's arguments come 45 years too late. Even if we were persuaded that the verdicts were irreconcilable, we would have to assume that the jury thought Halloran guilty and properly convicted petitioner, but, for reasons that are unknown, decided to let Halloran go free.

I.B(1). As to counts I and II, petitioner is wrong in arguing that *DeVincent* does not dispose of the constitutional issue in this case. In *DeVincent* the issue was not the sufficiency of the evidence, but the constitutionality of an instruction that tracked § 892(b). By upholding the constitutionality of the instruction, we necessarily indicated our view that this permissive inference is constitutional. Nothing in our ruling in *DeVincent* turned on the presence or absence of threats of violence. Indeed, § 892(b) comes into play as a significant factor only when the jury does not have creditable direct evidence of a threat of violence.

I.B(2). We stand by our conclusion that the jury was entitled to draw certain inferences from petitioner's statements and that these inferences together with the other facts in evidence provided a sufficient evidentiary basis for the jury's conclusion that petitioner was guilty beyond a reasonable doubt.



II.A. (1). As to the admissibility of Pallotta's statement regarding petitioner's reputation, our opinion discussed the only substantial issue that petitioner preserved for appellate review. While it might be arguable that the government did not sufficiently lead Pallotta through the *Whiting* line of inquiry before it elicited his testimony, petitioner registered no objection to this failing at that time. The only point at which petitioner objected to the absence of an adequate foundation was in a written motion to strike, filed two days after the testimony. We note that we doubt that petitioner's procedural default prejudiced him. As our opinion indicates, the record reflects that Pallotta possessed the familiarity with petitioner's reputation which is required by *Whiting*.

II.A. (2). Petitioner is correct that there is no evidence in the record suggesting that reprisals were likely, and we did not intend to suggest that there was. We have, for reasons not directly raised in the petition for rehearing, decided to amend this portion of the opinion, and the amended version avoids any possible confusion. Page 12 and the first three lines of page 13 are amended to read as follows (Note 7 on page 14 will be renumbered note 9):

> "to attempt to impeach or challenge any testimony concerning the reputation of an individual. And here, where the borrower's reasonable belief regarding the lender's reputation for collection practices could have direct substantive significance, *see* § 892(b), it is imperative that a defendant be permitted to explore the basis for the debtor's belief and to attack or otherwise challenge the borrower's testimony. We recognize that many courts have held that it is permissible to question a reputation witness as to the specific persons who served as his sources. *See* 4 Wigmore on Evidence

(1972) § 1111 at p. 246 and cases cited in n. 1. But here we need not address the question whether such a rule generally should be followed. Under the specific circumstances of the case at bar we believe it was not reversible error for the district court to foreclose the inquiry.

We note, first, that appellant's interest in this inquiry is less substantial than might first appear. If Pallotta had been required to answer, appellant would have had to accept whatever responses were given, inquiry as to whether any or all of the named sources had actually given him the information being clearly collateral. Appellant's interest in this line of questioning was limited to attempting to cast doubt on Pallotta's conclusory assertions by showing that no specific sources existed.

Here, the evidentiary ruling interfered only minimally with this interest. The responses Pallotta gave to the appellant's counsel before the district judge cut off the questioning indicated that Pallotta probably could have listed a number of names but, for some reason, was very reluctant to do so.[7] In precluding further inquiry, we think the district court probably concluded that Pallotta could have given the names of specific individuals but feared exposing them to reprisals. While there was no specific evidence that any reprisals

[7] Q. Would you tell us, sir, from whom you received that street knowledge. Tell us the names of the persons.
A. I have to go through the whole North End.
Q. Tell me the names.
A. Common street names.
Q. Tell me the name of a particular person who told you about — (App. Vol. III p. 423).
[Government's Attorney]: Objection, your honor.
The Court: Sustained.



had been threatened, we think, given the nature of the prosecution and the Congressional concerns, *see* Conf. Rep. No. 1397, 90th Cong., 2d Sess., 2 U.S. Cong. & Adm. News 2021, 2026 (1968), that the district court here had the discretion to cut off the questioning to protect third persons in the community. *Cf.* Fed. R. Evid. 403. Since it appeared that Pallotta could have given names, the inquiry would probably have availed appellant little. Moreover, the evidentiary ruling placed only a minor restriction on appellant's ability to challenge the foundation for Pallotta's beliefs.

There were a number of traditionally accepted devices by which appellant could have cast doubt upon or attacked the reasonableness of Pallotta's belief. First, appellant could have required Pallotta to specify the particular rumors of misconduct or statements he heard which led him to assert that appellant had a reputation for violent collection practices, from how many people he had heard these rumors, and whether he actually knew of any incidents. *See* Wigmore on Evidence § 1111 at 245.[8] If Pallotta had been unable to respond with specifics, his broad assertions presumably would have been doubted by the jury. And other, perhaps less effective, devices were available: e.g., introducing reputation evidence contrary to Pallotta's, or, as appellant actually did, introducing evidence of specific acts which were inconsistent with the supposed reputation. While we find no reversible error here, we recognize the danger of allowing preju-

[8] Indeed, the decision to pursue the names of sources rather than these other approaches is consistent with a tactical purpose to gain some advantage from Pallotta's obvious reluctance to name specific individuals."

dicial reputation testimony without any realistic testing for its credibility. To the extent that a strong foundation has not been developed prior to admission, a court should not be too strict in restricting cross-examination."

II.B The court acknowledges the error it committed in stating that Pagano and Matera had been seen together. This, however, was a small point, and does not in any way affect the validity of the conclusions we reached. The opinion will be amended to eliminate the erroneous clause, "testimony which . . . records.", which begins at the bottom of page 14 and continues on page 15.

For reasons not raised in the petition for rehearing, we will also amend this portion of the opinion in the following respects:

Page 14, lines 19 through 22 (beginning with "The sole") will be rewritten as follows: "As we did in *Petrozziello*, we will consider the evidence supporting the existence of the alleged conspiracies. Because, in each instance, we believe the evidence makes the existence of a conspiracy more likely than not, we affirm the district court's evidentiary rulings."

Page 14, line 25. Insert after "together" the following: ", and we believe it preponderates in favor of the existence of the conspiracy."

Page 15, lines 16 and 17, insert "our" in place of "a district court".

Petitioner's claim of surprise at our decision in *Petrozziello* and of his having been deprived of any opportunity to argue issues of law and fact relevant to that decision is somewhat belied by the fact that *Petrozziello* was decided more than nine weeks before we issued our opinion in this case. But in any event we do not see any necessity for rehearing based on the applicability of *Petrozziello*. We



have had the benefit of petitioner's views as to whether there was evidence from which a trier of fact could conclude that he and Pagano were members of a conspiracy. Appellant's brief at 46-47. And we doubt that petitioner can claim any prejudice from the application of the ordinary civil standard of proof, for even if the reasonable doubt standard applied, we would conclude that the two conspiracies existed.

Although we deny the petition for rehearing on the other points, we would appreciate hearing the views of counsel on the question whether Fed. R. Evid. 104 effects a partial overruling of *Glasser*. In addressing this issue, counsel are to assume the validity of our basic approach in *Petrozziello*. Counsel should also address the question whether, if any error occurred in admitting Pagano's statements, it was prejudicial. We would like both the petitioner and the government to submit their memoranda, in typed form, within 14 days.

*So ordered.*

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# United States Court of Appeals for the First Circuit

No. 76-1372

UNITED STATES OF AMERICA,

APPELLEE,

*v.*

JAMES MARTORANO,

APPELLANT.

ON PETITION FOR REHEARING.

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

*Joseph S. Oteri*, with whom *Oteri & Weinberg*, *Alan M. Dershowitz*, *Jeanne Baker*, and *Rosenberg Baker & Fine* were on brief, for appellant.

*Dennis A. Winston*, Attorney, Department of Justice with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney, Boston Strike Force, and *Mervyn Hamburg*, Attorney, Department of Justice, were on brief, for appellee.

August 24, 1977

COFFIN, *Chief Judge*. Having on appellant's petition for rehearing granted leave to file briefs on the issue whether *Glasser* v. *United States*, 315 U.S. 60 (1942), has been partially overruled and having now considered the briefs of the parties submitted on this question, we continue to believe that the viability of *Glasser* is in some doubt for the reasons we state below. But our further reflections have persuaded us that we need not face this troublesome issue in this case, for we are satisfied that the tapes of the





Pagano-Pallotta conversations were properly admitted under *Glasser*.

Although *Glasser* confines a district court to the "independent" evidence in deciding whether to admit a statement by a co-conspirator, it has never been the case that statements of the declarant were automatically excluded from consideration. The district court has always been permitted to consider statements by the declarant which are not hearsay or which are admissible in their own right under an exception to the hearsay rule. *United States* v. *Geaney*, 417 F.2d 1116, 1120 n. 3, 1121 & n. 4 (2d Cir. 1969); *see United States* v. *Callarco*, 424 F.2d 657, 660 & n. 1 (2d Cir. 1970). After reconsidering these tapes in light of the government's briefs, we are persuaded that many of Pagano's statements were "verbal acts", *see Lutwak* v. *United States*, 344 U.S. 604, 617-19 (1953); VI Wigmore on Evidence § 1766; *cf. Anderson* v. *United States*, 417 U.S. 211, 219-21 (1974). These statements, when considered along with the other pieces of independent evidence, provide a solid basis for the conclusion that a conspiracy existed.

The eight Pallotta-Pagano telephone conversations that were admitted into evidence occurred at various times between December 20, 1974 and January 20, 1975. Although many of the statements Pagano made would be most damaging to appellant only if taken as establishing the truth of the matter asserted, e.g., Pagano's assertion that he had supplied appellant with some of the money that had been lent Pallotta or the statements to the effect that Pallotta would be in danger if he went to appellant's nightclub, other statements were significant simply because Pagano had made them. These include: a large number of statements Pagano made indicating his knowledge both of the loan and of Pallotta's delinquent status; *see* VI Wigmore on Evidence § 1790; and an equally large number of state-

ments which we do not hesitate to characterize as attempts to facilitate and/or to encourage further payments of the loan.[1]

In addition, we note that one of Matera's statements which was admitted into evidence suggests that Pagano was actually in touch with Matera during this period and that Pallotta's situation had been discussed. On January 20, 1975, some twenty minutes after the final call to Pagano, Pallotta telephoned Matera who answered Pallotta's query with three highly suspicious denials of all knowledge concerning the matter and with the statement "[a]nd don't call that other fellow no more." The most natural inference, given the context, is that the "other fellow" was Pagano and that he had been in contact with Matera concerning Pallotta.

The statements we have referred to could properly be considered by the judge in determining the preliminary question whether Pagano and appellant were members of a common venture. The "independent" evidence thus shows the following. First, there is rather overwhelming evidence that appellant and Matera were members of a common illicit venture. Several pieces of evidence tending to link Pagano to that enterprise are that Matera and appellant were co-conspirators; that Matera and Pagano were long time loan shark partners who, inferentially at least, would be involved in each other's ventures; that

[1] All eight calls constituted attempts by Pallotta to find out precisely where he stood with appellant and Matera. Several of the calls consisted of long conversations in which they would talk, sometimes, in Pagano's words, "between the lines" about Pallotta's plight. In virtually each call, Pagano expressed a willingness to get information Pallotta wanted. While Pagano never fully delivered on his promise, in each call he encouraged Pallotta to phone back at some future date when Pagano expected to have the information. While other inferences are of course possible, the simple fact that he was willing to talk to Pallotta at some length about his situation and encourage him to call back suggests that Pagano had an interest in facilitating a normalization of the appellant-Pallotta, creditor-debtor relationship. Pagano also at one time assured Pallotta that one payment must have been received and, in one of the last taped conversations, he offered to help arrange further payments if Pallotta should find himself in a position to make them.



Pagano accompanied Matera to collect an interest payment from Pallotta; and that Pagano, in late December, 1974, and early January, 1975, was aware of Pallotta's plight, was willing to take steps to find out Pallotta's situation and to facilitate future payments, and had in fact been in touch with Matera and discussed Pallotta's situation. We thus have no difficulty concluding that it preponderates in favor of the existence of a conspiracy between Pagano and appellant. It is true that each of these items is susceptible to an interpretation other than Pagano's participation in the conspiracy. However, when viewed together, each of them gains color from the others and they satisfy us that Pagano and appellant had associated themselves "in a concerted mutual venture".

Having raised the issue of the continued vitality of *Glasser's* requirement that the proof of the existence of the conspiracy be independent of the statement seeking admission, we will briefly outline why we think *Glasser's* survival may be in doubt. Here, the portion of the taped conversation which is relevant to the conspiracy determination is Pagano's statements to the effect that he had put up part of the money appellant loaned Pallotta. Although inadmissible, these statements were highly reliable. In fact, they come within a hair of being admissible in their own right. If there had been the requisite showing that Pagano was unavailable, they would, we presume, have been admissible as declarations against Pagano's penal interest. *See* Fed. R. Evid. 804(b)(3); *United States* v. *Barrett*, 539 F.2d 244, 251 (1st Cir. 1976). Moreover, the circumstantial guarantees of trustworthiness arguably were also such that these statements would have been admissible in their own right if the proper notice had been given. *See* Fed. R. Evid. 802(24).

But since the statements were inadmissible, the question here is whether such reliable evidence may be considered

by the district court in determining the preliminary fact whether a conspiracy exists. Both the policies and plain terms of Fed. R. Evid. 104(a) seem to indicate that it could be. The rule provides that inadmissible evidence can be considered by the district court in making such determinations, making no distinction between inadmissible evidence generally and the statement seeking admission. And the reason behind the rule — that trial judges, because of their legal experience and training, "will generally be fully cognizant of [the] inherent weakness [of such evidence] . . . and will take such weakness into account in evaluating the preliminary question", Weinstein on Evidence ¶ 104[02](7) at 104-24 — is equally applicable to the two kinds of statements. It seems that, once hearsay is placed before the district court, it would be a matter of indifference to the criminal defendant what its source is.

The appellant's argument for the contrary view proceeds from the fact that *Glasser* was premised on the Court's desire to prevent "bootstrapping" of the very hearsay utterance seeking admission to the level of competent evidence. We note first that the new rules permit precisely such bootstrapping in circumstances in which hearsay is trustworthy. *See* Fed. R. Evid. 803(24). And we have to wonder whether a generalized abhorrence of bootstrapping is sufficient justification for barring all use of the trustworthy features of the hearsay statement seeking admission. But under any view of the law we would, as we said in our original opinion, require significant independent evidence of the existence of the conspiracy, deviating from the *Glasser* practice only to the extent of permitting the district court to consider the independent evidence in the light of the color shed upon it by the highly trustworthy and reliable portions of the hearsay utterance seeking admission. This approach would afford the criminal defendants most of the protections provided by the rule of *Glasser*, yet give free play to Rule 104(a)'s policy of recognizing the trial judge's ability to assess the weight to be given otherwise inadmissible evidence.[2]



We emphasize that our opinions in this case should not be understood as deciding anything about the continued viability of *Glasser*. We intend to have done no more than indicate the basis for our doubts. Our decision in this case rests solely upon our view that the "independent" evidence established the existence of a concerted mutual venture.

*A part of the petition for rehearing having been previously denied, the balance of the petition for rehearing is denied.*

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[2] Although we entertain these doubts about *Glasser's* survival, we note that other courts have assumed that the new federal rules have not affected *Glasser* in the slightest. *See United States* v. *Stanchich*, 550 F.2d 1294, 1298-99 n.4 (2d Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976); *United States* v. *Stroupe*, 538 F.2d 1063, 1065, 1066 (4th Cir. 1976); *United States* v. *Savell*, 546 F.2d 43, 46-47 (5th Cir. 1977); *United States* v. *Burgard*, 551 F.2d 190, 196 (8th Cir. 1977); *United States* v. *Wood*, 550 F.2d 435, 442 (9th Cir. 1977). In none of these, however, was the issue specifically considered.

SUPREME COURT OF THE UNITED STATES

No. A-242

JAMES MARTORANO,
PETITIONER,

*v.*

UNITED STATES

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**Order Extending Time to File Petition for Writ of Certiorari**

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 23, 1977.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 13th day of September, 1977.

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UNITED STATES CODE

TITLE 18

*Crimes and Criminal Procedure*

Chapter 42. Extortionate Credit Transactions

*Section 891. Definitions and rules of construction*

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.

*Section 892. Making extortionate extensions of credit*

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):



(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.

NO. 77-603

Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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JAMES MARTORANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.,
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-603

JAMES MARTORANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A) is reported at 557 F.2d 1.[1] The opinion of the court of appeals denying a petition for rehearing (Pet. App. 24a-29a) is reported at 561 F.2d 406.

### JURISDICTION

The judgment of the court of appeals was entered on March 30, 1977. A petition for rehearing was de-

[1] The original opinion of the court of appeals (Pet. App. 1a-16a) was amended (Pet. App. 17a-23a) prior to its publication.

nied in part on May 23, 1977 (Pet. App. 17a-23a) and in part on August 24, 1977 (Pet. App. 24a-29a). Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 23, 1977 (Pet. App. 30a). The petition for a writ of certiorari was filed on October 25, 1977, a Tuesday following a Monday holiday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was in any way affected by the permissible inference in 18 U.S.C. 892(b) that a particular extension of credit is extortionate if each of four specified factors is present in connection with that extension of credit.

2. Whether the district court impermissibly restricted petitioner's cross-examination of a government witness concerning the basis of the witness's knowledge of petitioner's reputation for violence.

3. Whether the statements of one of petitioner's co-conspirators were properly admitted into evidence against petitioner.

## STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of making an extortionate extension of credit, using extortionate means to collect an extension of credit, and conspiring to commit those offenses,



in violation of 18 U.S.C. 892 and 894. He was sentenced to ten years' imprisonment and fined $10,000 (App. 108).[2] The court of appeals affirmed (Pet. App. 1a-16a).

The charges arose from a loan made by petitioner to Peter J. Pallotta. The evidence showed that in the late Summer of 1974 Pallotta, the owner of an unsuccessful nightclub, tried to borrow money from various "loan sharks" to meet the club's operating expenses (App. 234-236). In late August or early September, Pallotta went to see petitioner at his restaurant to seek a loan. Petitioner agreed to lend Pallotta $2,000 at an interest rate of five percent per week; no papers were signed and no collateral was requested or tendered (App. 241-242).

At petitioner's direction, Pallotta returned to petitioner's restaurant on the following day to pick up the money. With petitioner at that meeting was co-defendant James Matera. After handing Pallotta the money, petitioner instructed Matera to collect the weekly interest payments on Friday nights at Pallotta's club (App. 242-244). During the next four weeks, Pallotta made the weekly interest payments. On three occasions, once while accompanied by co-defendant Frank Pagano, Matera picked up the money from Pallotta at his nightclub; once, when Matera was busy, Pallotta delivered the money directly to petitioner (App. 260-262).

In October 1974, Pallotta's nightclub was closed for renovations and Pallotta fell behind in his weekly

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[2] "App." refers to the appendix in the court of appeals.

payments (App. 262-263). On the evening that the club reopened, petitioner and co-defendant Edward Halloran appeared at the club. Pallotta departed, fearing that he would be beaten for having missed his payments (App. 267-268). The next day, Pallotta received a telephone call as a result of which he agreed to make himself available to petitioner that evening (App. 268-269). That night, Halloran accosted Pallotta in the nightclub's parking lot, accused him of sneaking out on petitioner the previous night, and stated that petitioner had sent him to collect the back interest payments. Halloran then drew a gun and forced Pallotta to hand over $445 from the club's cash boxes (App. 269-271; 482-483; 507-508). Three days later, Pallotta went to see petitioner, who warned him "[d]on't be late and see me every week and if you're not going to be here, I want a phone call from you" (App. 272-273).

Shortly thereafter, the club was permanently closed and Pallotta, fearing physical injury, went into hiding. He subsequently sought protection from the FBI. Working in concert with law enforcement officers, Pallotta made a series of phone calls to Halloran, Matera, Pagano, and petitioner, all of which were recorded. The tape recordings of these conversations were played at trial (App. 114-149, 273-277, 551-556). In the course of one of the conversations, petitioner suggested that Pallotta stop by and see him (App. 116). When Pallotta expressed his fear of being harmed, petitioner responded (App. 117):



> Don't talk like that on the phone. * * * You can come any time, what do you think I'm gonna do something 'round my own place? Be kind of stupid wouldn't it? Ah, first chance you get drop by and see me, alright?

The conversations between Pallotta and Pagano verified the existence of the loan (App. 119-123), revealed that Pagano and Matera had supplied petitioner with half the money involved in the loan (App. 128), and confirmed Pallotta's fear that he would be injured if he went to see petitioner at his restaurant (App. 120, 123-124, 144-145).

At trial, Pallotta testified that at the time of the loan he knew petitioner was a loan shark with a "100 percent" collection record, and that "[n]obody missed" his payments because "[i]f they did, they got hurt" (App. 246-247). He testified that he also knew that co-defendants Halloran, Matera, and Pagano were loan sharks, that they would hurt any borrower who was late or failed to make a payment, and that Halloran collected for petitioner (App. 249, 256-259).[3] Finally, Pallotta testified that at the time the loan was made he expected that he would be physically harmed if he failed to repay the loan on time (App. 257).

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[3] The reputation evidence was admitted to show Pallotta's state of mind at the time the loan was made. See *United States* v. *Natale*, 526 F.2d 1160, 1168-1169 n. 10 (C.A. 2), certiorari denied. 425 U.S. 950; *United States* v. *Bowdach*, 501 F.2d 220, 226-227 (C.A. 5), certiorari denied, 420 U.S. 948.

## ARGUMENT

1. Petitioner argues at some length (Pet. 13-25) that the use of the statutory inference permitted by 18 U.S.C. 892(b) creates an unconstitutional presumption, and that his convictions on Counts I and II must therefore fall. Whatever the abstract merits of petitioner's contention, the fatal flaw precluding consideration of the contention in the present case is that the jury convicted petitioner without in any way relying on the Section 892(b) inference, which was not mentioned to it in the court's instructions, and the court of appeals found the evidence sufficient to support that conviction, either with or without the inference (Pet. App. 5a-6a). Petitioner was thus in no way prejudiced by the operation of Section 892(b) and is in no position to challenge its constitutionality.

Under 18 U.S.C. 892(a), the offense charged in Counts I and II, the government must ordinarily prove that both the lender and the borrower understood at the time of the loan that delay or failure in making repayment "could result in the use of violence or other criminal means." 18 U.S.C. 891(6). Because Congress appreciated that victims might often be reluctant to testify and that it would therefore be difficult in many cases to produce direct evidence of the understanding of the parties, Section 892(b) was added to provide an alternate means of proving a violation of Section 892(a). H.R. Conf. Rep. No. 90-1397, 90th Cong., 2d Sess. 29 (1968).



Section 892(b) provides that in place of showing that both the lender and the borrower contemplated the use of violence in case of default, the government can establish a *prima facie* violation of Section 892(a) by proving that four factors accompanied the loan in question: (1) repayment was legally unenforceable; (2) the annual interest rate exceeded 45 percent; (3) the debtor reasonably believed that the lender had used extortionate means to collect debts in the past or that he had a reputation for doing so; and (4) the total amount of the loan exceeded $100.

In this case, the conviction was obtained directly under Section 892(a), without the need for reliance on the Section 892(b) inference. The trial court instructed the jury, in accordance with Sections 892(a) and 891(6), that in order to convict petitioner, they had to find beyond a reasonable doubt that the loan to Pallotta was made (App. 812)

> with the mutual understanding on the part of Pallotta and [petitioner] that if there were delays in making repayment or a failure to make repayment that violence or other criminal means to cause harm to Pallotta would be used * * *.

The court repeated its charge on the elements of the offense under Section 892(a) (App. 812-813), again emphasizing the need to prove that both petitioner and Pallotta understood that violence might be used. In addition, the court twice instructed the jury on the definition of "extortionate extension of credit" in Section 891(6), both times correctly noting that the

definition required that both lender and borrower contemplate the possible use of violence (App. 805, 807).[4]

The court of appeals rejected the claim that there was insufficient evidence to support the jury's conclusion that petitioner understood that violence would accompany nonpayment of the loan. While the court held that the evidence was sufficient to satisfy the statutory inference under Section 892(b) (Pet. App. 5a), it also held that there was ample direct evidence of petitioner's understanding that violence might be used, including the recording of petitioner's highly incriminatory telephone conversation with Pallotta (Pet. App. 6a).

Besides that conversation, in which petitioner warned Pallotta not to discuss his fears of being injured over the telephone and added that Pallotta had nothing to fear because it would be foolish for petitioner to "do something 'round my own place[?]" (App. 117), the evidence showed that petitioner had made an unannounced appearance at Pallotta's nightclub together with co-defendant Halloran, and that the next night Halloran had forced Pallotta to make a $445 loan payment at gunpoint. Following this incident, petitioner had warned Pallotta, "[d]on't be

[4] As the court of appeals pointed out (Pet. App. 5a-6a), the trial court referred to the interest rate on the loan and to the fact that the loan was unenforceable in Massachusetts (App. 810-811)—two of the factors referred to in Section 892(b)—but rather than telling the jury that it could convict solely on the basis of those or any other factors, the court merely stated that the jury could "give [the factors] such weight as [the jury] deem[ed] appropriate" (App. 810).



late and see me every week." From all of this evidence, the jury could well infer that the use of violence against defaulting borrowers was a familiar practice to petitioner and that he had contemplated the possible use of violence at the time the loan was made. In addition, the jury was entitled to consider that the loan was an oral, unsecured obligation, made at an annual rate of interest of 260 percent, with provision for repayment at the borrower's place of business. See *United States* v. *Annoreno*, 460 F.2d 1303, 1308-1309 (C.A. 7), certiorari denied, 409 U.S. 852. The court of appeals was thus clearly correct in concluding that the evidence was sufficient to sustain petitioner's conviction without the need to rely on Section 892(b).

In any event, the inference permitted by Section 892(b) does not run afoul of the Due Process Clause. The statutory presumptions in *Leary* v. *United States*, 395 U.S. 6, and *Tot* v. *United States*, 319 U.S. 463, were both, as this Court concluded, contrary to fact. The inference established by Section 892(b), however, is consistent with experience and therefore does not offend due process principles. *Barnes* v. *United States*, 412 U.S. 837. *United States* v. *Gainey*, 380 U.S. 63, 68-70. In enacting Section 892(b), Congress recognized that if all four factors are established, the existence of an "understanding" that violence would be used follows almost inexorably. As was stated in the conference report (H.R. Conf. Rep. No. 90-1397, *supra*, at 29):

> In arms length transactions, people simply do not lend sums of money at exorbitant rates of inter-

> est under circumstances where they cannot enforce the obligation to repay. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated.

See also *Perez* v. *United States*, 402 U.S. 146, 155-156; *United States* v. *DeVincent*, 546 F.2d 452 (C.A. 1), certiorari denied, 431 U.S. 903.

2. Petitioner next contends (Pet. 26-30) that the district court improperly curtailed his cross-examination of Pallotta by sustaining objections to questions asking the names of the individuals who had informed Pallotta about petitioner's reputation. While noting that cross-examination of a reputation witness as to the identities of his sources is often permitted, the court of appeals concluded that under the circumstances of this case the trial court did not abuse its discretion in restricting cross-examination on this matter (Pet. App. 19a-22a).[5]

As the court of appeals noted (Pet. App. 20a), the court's ruling on the scope of cross-examination interfered only minimally with petitioner's efforts to cast doubt on Pallotta's testimony about his fears and

[5] The court of appeals pointed out that in limiting petitioner's inquiry as to his sources' names the court was apparently concerned with protecting third persons in the community from reprisals (Pet. App. 20a-21a), a legitimate interest that it was properly entitled to consider in exercising its well-recognized discretion to control the scope of cross-examination. See *Geders* v. *United States*, 425 U.S. 80, 86-87; *Hamling* v. *United States*, 418 U.S. 87, 124-125, 127.



petitioner's reputation. First, there were a variety of other lines of inquiry that counsel could have pursued in an effort to impeach Pallotta's testimony on these points. Pallotta could have been asked to specify particular comments he had heard that formed the basis for his belief that petitioner was reputed to use violent collection methods. He could have been asked the times and places at which he had heard these comments, and the number of persons from whom he had heard them. And he could have been asked whether he was personally aware of any such incidents. Pallotta's inability to give specific answers to these questions would have served petitioner's purpose of discrediting his reputation testimony. Petitioner was also free to introduce reputation evidence that rebutted Pallotta's testimony. His failure to employ any of these impeachment devices to any significant extent lends weight to the conclusion of the court of appeals that petitioner's decision to pursue the names of sources "is consistent with a tactical purpose to gain some advantage from Pallotta's obvious reluctance to name specific individuals" (Pet. App. 21a n. 8).

Even if the district court had required Pallotta to name his sources, it would have been appropriate for the court to have curtailed collateral inquiry into whether those persons in turn had a sound basis for their impressions of petitioner's reputation. Since from Pallotta's testimony it appeared that he could have given names if the government's objection had not been sustained (Pet. App. 21a), petitioner lost

very little by virtue of the district court's ruling. This case is therefore very different from *Davis* v. *Alaska*, 415 U.S. 308, on which petitioner chiefly relies. In *Davis*, this Court held that the defendant's cross-examination rights had been improperly restricted when the trial court refused to permit him to question the chief government witness about his prior conviction for burglary and his status as a probationer. The Court noted that these facts were critical to the defendant's effort to show that the witness was biased and that he feared being accused of the very burglary for which the defendant was on trial. In this case, by contrast, the restriction on cross-examination did not bar petitioner from demonstrating bias or otherwise impeaching Pallotta. Since the impeachment value of Pallotta's ability or inability to provide the names of his sources would have been minimal at best, petitioner cannot reasonably claim to have been denied his Sixth Amendment right "to be confronted with the witnesses against him."

3. Finally, petitioner argues that the out-of-court statements of alleged co-conspirator Pagano were improperly admitted against him.

The trial court permitted the government to introduce Pagano's statements in his tape-recorded conversations with Pallotta as the declarations of a co-conspirator, Fed. R. Evid. 801(d)(2)(E), and the court of appeals held that this evidence was properly admitted. Petitioner objects that there was insufficient independent evidence that he was engaged in a conspiracy with Pagano to permit the admission of



Pagano's statements. More broadly, petitioner contends that the court of appeals has improperly construed Rule 104(a) of the Federal Rules of Evidence as overriding this Court's decision in *Glasser* v. *United States*, 315 U.S. 60. This action, he contends, conflicts with the decisions of various other courts of appeals and runs afoul of the Confrontation Clause as well.

In fact, the court of appeals specifically *declined* to hold that Rule 104(a) overrides the requirement in *Glasser* that a defendant's participation in a conspiracy be proved by evidence independent of the statement at issue. Quite the contrary, the court held that "the tapes of the Pagano-Pallotta conversations were properly admitted under *Glasser*" (Pet. App. 24a-25a), and it emphasized that "our opinions in this case should not be understood as deciding anything about the continued viability of *Glasser*" (Pet. App. 29a). Indeed, the court of appeals concluded that the non-hearsay evidence in the case provided "a solid basis" for the conclusion that a conspiracy existed among the co-defendants and petitioner (Pet. App. 25a).

As the court stated, the independent evidence of petitioner's involvement in the conspiracy with Pagano was ample to meet the *Glasser* test.* The evidence

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* Significantly, petitioner makes no real effort to show that the court of appeals erred in its conclusion that there was sufficient non-hearsay evidence to meet the *Glasser* standard, preferring instead to focus upon his theoretical disagreement with portions of the court's opinions. His only quarrel

showed that Pagano and Matera were long-time loan shark partners; that Matera was working closely with petitioner in the Pallotta loan venture; that Pagano accompanied Matera to collect one of the interest payments from Pallotta; and that Pagano was aware of Pallotta's plight and was trying to find ways to facilitate future payments to petitioner. (Pet. App. 26a-27a). On the basis of this evidence, the court of appeals observed (Pet. App. 27a):

> We thus have no difficulty concluding that [the evidence] preponderates in favor of the existence of a conspiracy between Pagano and [petitioner]. It is true that each of these items is susceptible to an interpretation other than Pagano's participation in the conspiracy. However, when viewed together, each of them gains color from the others and they satisfy us that Pagano and [petitioner] had associated themselves "in a concerted mutual venture."

Since the court of appeals correctly held that the *Glasser* test was met in this case, petitioner is incor-

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with the court's actual assessment of the non-hearsay evidence appears to be with respect to the declarations of Pagano that the court determined to be "verbal acts." Petitioner contends that although these "verbal acts" were not hearsay as to Pagano, they were nonetheless hearsay as to petitioner (Pet. 13). In this contention, petitioner is plainly mistaken. Verbal acts, admitted for the fact that the utterance occurred rather than to prove the truth of its contents, are not hearsay at all; they are freely admissible independent of any preliminary finding that petitioner was engaged in the conspiracy. See *Anderson* v. *United States*, 417 U.S. 211, 219-221; *United States* v. *Geaney*, 417 F.2d 1116, 1120 n. 3 (C.A. 2).



rect in claiming that the court's decision flies in the face of *Glasser* or conflicts with other circuits in their treatment of co-conspirators' declarations.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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## Reply Brief of Petitioner.

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## Reply Brief of Petitioner.

The central point in the Government's brief in opposition to certiorari is its assertion that there was sufficient direct evidence from which the jury could have concluded beyond a reasonable doubt that petitioner *intended* to threaten the alleged victim with violence in the event of nonpayment.

Accordingly, the Government contends that "whatever the abstract merits of petitioner's contention," this case does not present this Court with an occasion to decide the constitutionality of 18 U.S.C. § 892(b) (Government's Brief in Opposition at p. 6).* But there is simply no evidence, direct or indirect, that the petitioner intended to threaten violence, and the Government points to none. Petitioner challenges the Government to specify the items of evidence — individually or cumulatively — from which the jury could conclude *beyond a reasonable doubt* that this was an *extortionate* loan as distinguished from a merely *usurious* loan.

The Government points to only one extremely ambiguous statement in one conversation in which the petitioner says to the alleged victim:

> Don't talk like that on the phone. . . . You can come any time, what do you think I'm gonna do something 'round my own place? Be kind of stupid wouldn't it? Ah, first chance you get drop by and see me, alright?

But surely this is not proof of any kind, certainly not beyond a reasonable doubt, that the petitioner intended to threaten violence. Even the Government appears to concede in its statement of facts that the other recorded conversations do not establish an extortionate intent on the part of the petitioner. This is how the Government characterizes the evidentiary value of the Pallotta-Pagano conversations:

* The other points addressed in the Government's brief are adequately covered in the original petition and will not be responded to here.



> The conversations between Pallotta and Pagano verified the existence of the loan (App. 119-123), revealed that Pagano and Matera had supplied petitioner with half the money involved in the loan (App. 128), and confirmed Pallotta's fear that he would be injured if he went to see petitioner at his restaurant (App. 120, 123-124, 144-145).

Nowhere is there any reference to petitioner's extortionate intent.

Petitioner respectfully invites this Court to review the lower court opinions and the record for itself. Petitioner submits that the Court will conclude that there is absolutely no direct evidence in this case that the petitioner ever intended to threaten or ever threatened the alleged victim. The only conceivable basis on which this conviction could be upheld, therefore, is by invoking the unconstitutional inference contained in 18 U.S.C. § 892(b). This case thus squarely presents that important issue. Since the vast majority of usurious loans made in the country are not extortionate, petitioner respectfully submits that a conviction for extortion cannot be based on evidence of usury. That is precisely what occurred here.

Respectfully submitted,

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